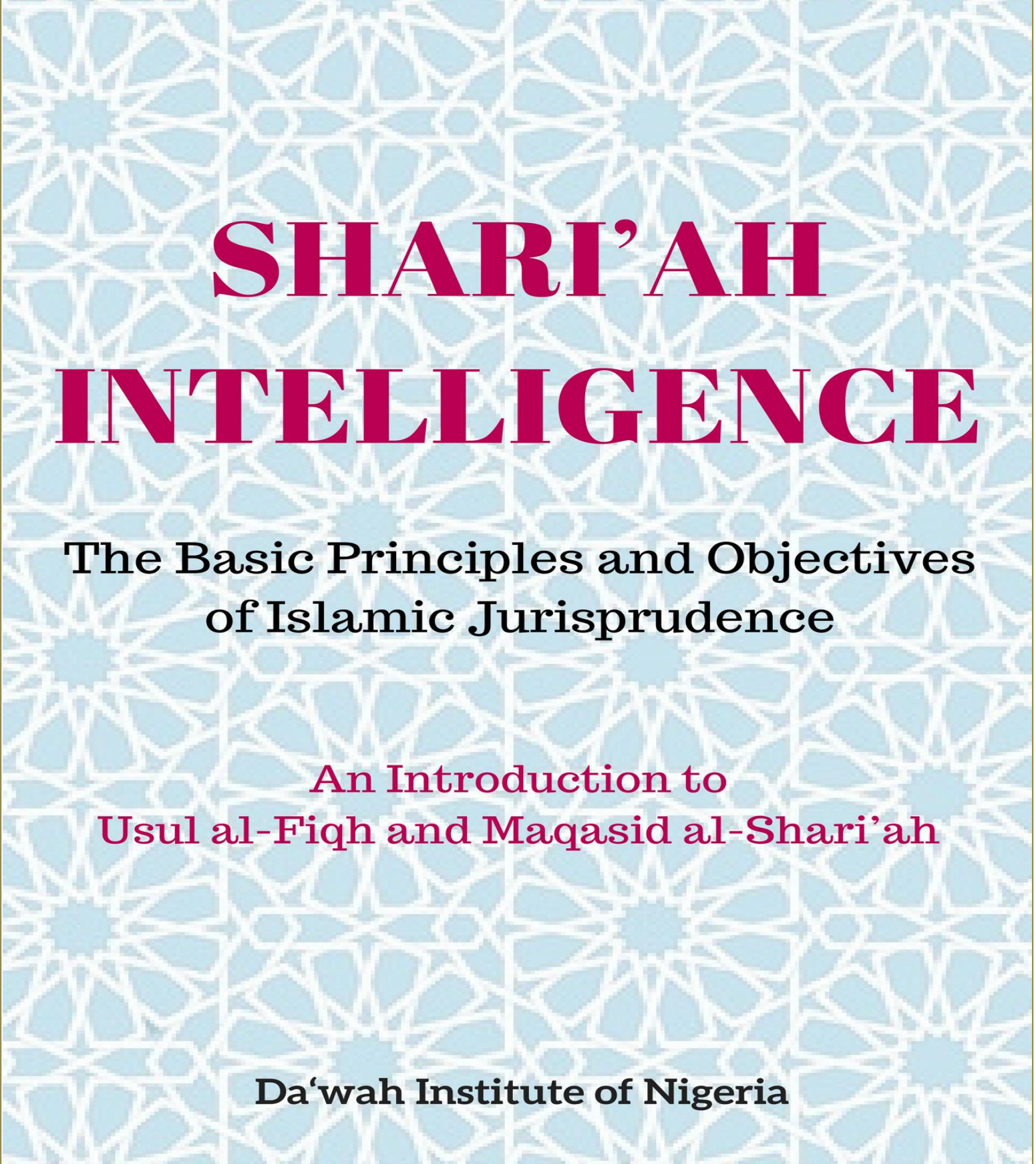




SHARI'AH INTELLIGENCE

The Basic Principles and Objectives
of Islamic Jurisprudence

An Introduction to
Usul al-Fiqh and Maqasid al-Shari'ah

Da'wah Institute of Nigeria



SHARI'AH INTELLIGENCE

THE BASIC PRINCIPLES AND OBJECTIVES OF ISLAMIC JURISPRUDENCE

*A Introduction to Usul Al-Fiqh
and Maqasid Al-Shari'ah*

Developed by

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We are profoundly grateful to the National President of the Islamic Education Trust (IET), Dr. Sheikh Ahmed Lemu OFR., whose vision gave birth to this noble idea of helping people develop a better understanding of the classical juristic approaches to the interpretation of religious texts. He has continued to provide wise guidance and support to the Da'wah Institute.

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May Allah bless your knowledge long after you are gone. Whatever mistakes still remain in this material are the sole responsibility of the Da'wah Institute of Nigeria.

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To the Management and Staff of the Da'wah Institute of Nigeria and the Islamic Education Trust, we say thank you for your continuous support and cooperation.

To all we say *Jazakumullahu Khairan*.

Wassalamu alaikum wa rahmatullahi wa barakatuh

Ibrahim Ayobami Yahya

(Director, Da'wah Institute of Nigeria, Minna)

December, 2015.

FOREWORD

Like many other Muslim activists and thinkers, I have devoted a lot of time to clarifying misunderstandings about Islam not just among non-Muslim communities but also within the Muslim Ummah. One of the greatest challenges to gaining a better understanding of Islam is the lack of understanding about the fundamental objectives of Shari’ah and the tools of juristic reasoning or *ijtihad*.

While a simple rational and text-based answer is sufficient to dispel misconceptions for most non-Muslims, some Muslim scholars employ technical but unreasonable arguments backed up by the opinion of some respected scholars that make it more difficult for many people to accept a simple, faith-based answer to a challenging question. Acceptance is even more difficult when teachers are of the conviction that in order to respect the Islamic scholarly heritage and maintain consistency, there is no need to look beyond the pronouncements of their preferred scholars and School of Juristic Thought (*madhhab*), even when it is clear that these particular opinions do not help in achieving the higher objectives of Shari’ah – i.e. justice, compassion, wisdom and good – as effectively as other opinions, when the present realities of an increasingly globalized world are considered more seriously.

Despite their popularity, most public speakers in the Ummah are unable to handle many conscience-disturbing or faith-shaking questions. These popular leaders and preachers are often out of their depth when faced with matters regarding the application of contemporary *fiqh* (Islamic jurisprudence) to their present context – especially in the area of social transactions (*mu’amalat*). This is more so where there are clear differences of opinions among scholars, or where the consideration of the present context and consequences matter significantly in the determination of the ruling or *fatwa* given by scholars.

There is dire need for an effective way of addressing this challenge. Discussions or questions need answers and scholarly *fatwas* that are sensitive to cultural or social realities, such as those faced by Muslim minorities or more globalized communities. These are communities where Muslims come from different cultural backgrounds and whose families follow different Schools of Islamic law or Jurisprudence (or *madhahib*), sometimes without even knowing what a School of Juristic Thought (*madhhab*) actually is. Many such young Muslims are not connected to competent traditionally-trained local scholars, who in turn do not or cannot join the online discourses of the “cyber Ummah.” As a result, searches on “Sheikh Google” and “Mufti YouTube” quickly issue answers on

behalf of Islam, including answers developed by islamophobes, with no concern for the context of the questioner or person concerned. The answers that are learned by Muslims and non-Muslims using these means have resulted in disturbing misunderstandings and gross distortions of Islamic teachings, values and principles.

The Ethics and Protocols of Disagreement

The rampant misinformation spread via social media and internet websites appears to be typically void of traditional Islamic Ethics of Disagreement and managing dissent. This critical subject is well explored in two highly recommended books: Taha Jabir al-Alwani's *Ethics of Disagreement in Islam*, and Yusuf Al-Qaradawi's *Islamic Awakening: Between Rejection and Extremism*.

Through the study of Ethics, Muslims may understand the importance of respect, courtesy and humility when handling the diversity of opinions among Muslim scholars. It emphasises that unity is not uniformity and, therefore, differences of opinion do not imply disunity. This is very important for both young and older Muslims to comprehend. We must not allow differences on less fundamental issues to erode mutual trust, cooperation and unity, especially in the face of some of our priorities and current challenges as an Ummah.

Yet, many youth appear to be challenged by the concept that two or more differing opinions held by scholars could both or all be correct. In the minds of such youth, opinions or rulings that are derived from the authentic text of the Qur'an or Sunnah should be mathematically definitive – with one right answer, everything else being wrong. People who think in this way believe that if we do not identify some opinions as wrong, then we are tolerating falsehood and heretical innovations (*bid'ah*) for the sake of peace.

This premise makes a false analogy between the field of Jurisprudence and the field of Mathematics. In Jurisprudence, there are some teachings of Islam that are definitive and accepted by a consensus of scholars. However, in many other cases, Jurisprudence can better be compared to the field of Medicine, where multiple methods of treatment are valid. In this analogy, doctors may all agree on a diagnosis but they may offer different prescriptions based on their medical model¹, the patient's medical history, the treatments available and their potential interaction with other medications being taken by the patient. Islamic Jurisprudence and the use of *Ijtihad* (juristic reasoning) is similar

¹ A medical model based on nutrition may lead to a different prescription from a medical model based on pharmaceutical drugs, acupuncture or traditional medicine.

in its flexibility and ability to match “prescriptions” to varying contexts while still achieving the objectives (*maqasid*) of individual and communal well-being.

Young Muslims should know, therefore, that the work of a jurist is more like that of a Doctor than a Mathematics Professor. The qualifications of a jurist make him/her different from a scholar of the Qur’an (*Mufasssir*) or a scholar of Hadith (*Muhaddith*). Traditionally, only a *Faqih*, *Mufti* or *Mujtahid* would be qualified to issue religious verdicts (*fatwas*), and not a *Muhaddith*, *Mufasssir* or anyone else. This is because a jurist is more knowledgeable and qualified in the use of analogy (*qiyas*), consensus (*ijma’*), “public interest” (*maslahah*), juristic discretion (*istihsan*), etc. The use of these principles is not the specialisation or forte of the *Mufasssir* or *Muhaddith*. Sadly, neither Google nor YouTube identify what the specialisations of online speakers and writers are.

The case for “Shari’ah Intelligence”

In the days I was a student of Islamic history, Arabic and Law, there was no internet. We had to travel in search of the right teachers. These days, not only do people find teachers and mentors online, some believe they can become scholars online. Internet websites and books are great tools of knowledge and make the work of teachers easier to access if you are unable to travel to them. It is still important to remember, however, that these tools are insufficient for scholarship as they do not provide the rigorous analysis and critical evaluation that is expected under the guidance of a qualified supervisor.

A little of the right type of learning can, nonetheless, intellectually vaccinate a person from falling into a lizard’s hole. While we may find it difficult to test the competence of a good doctor, it is not as difficult to identify an incompetent or fake one. A little knowledge of the fact that doctors must ask questions about the onset and duration of an illness before prescribing medications can assist in identifying a doctor who is not doing his job properly. To understand what *ijtihad* actually entails and how to identify those individuals who are not qualified to perform it calls for an introductory level of understanding in the field of *Usul al-Fiqh* and its sister, *Maqasid al-Shari’ah*.

This is why a basic level of “Shari’ah Intelligence” is so important. Young people find the subject of Ethics of Disagreement much easier to digest after they have understood how different “prescriptions” for a condition exist among practitioners, and why it is important for such different treatments to be made available. Basic Shari’ah Intelligence should vaccinate a person from a

preacher who attempts to sow discord by labelling those who hold different opinions as “*kuffar*” (rejecters of Truth), “hypocrites” or “traitors”.

If we are to use the language of our IT age, this course enables a participant to “download” the “operating system” that allows him/her to develop “compatibility” with the methodologies used by the classical jurists and their Schools of Juristic Thought in reaching verdicts (*fatwas*). Through downloading the limited version of “Shari’ah Intelligence”, a participant will be able to understand, to a significant extent, the appropriateness and relevance of the arguments of scholars, both past and contemporary, on a given topic. Participants will be able to discern the methods used by a credible jurist as distinct from the approaches of someone who specialises in another branch of Islamic knowledge or has no specialisation at all. Moreover, participants will be able to appreciate *Muftis* and *Mujtahids* who negotiate *Usul al-Fiqh* with *Maqasid al-Shari’ah* to provide Islamic opinions on the most challenging issues of contemporary life.

My prayer is that this course will help participants to be more grounded in this field and generate even greater interest in it as we strive for a more peaceful world. I pray it would help in making us more humble in our intellectual pursuits, more respectful of human diversity, more curious about our weaknesses, more fair and compassionate in our dealings with others, more balanced in our opinions, more committed to living Islam with purpose, and more sincere in our readiness to please Allah alone.

May the peace and blessings of Allah be upon us all.

Dr. Sheikh Ahmed Lemu, OFR

Former Grand Kadi, Shari’ah Court of Appeal,

Minna, Niger State, Nigeria

(2014 King Faisal Prize-Winner for Service to Islam)

PREFACE

The **Da’wah Institute of Nigeria (DIN)** of the **Islamic Education Trust (IET)** was established for the primary purpose of building the capacity of *da’wah* workers, Islamic organisations and Muslim professionals by providing them with relevant information and effective methodologies for delivering the message of Islam, promoting greater peaceful coexistence and contributing to social progress. The achievement of this mission naturally requires the collaboration of intra-faith and inter-faith organisations and networks to identify critical knowledge and skill gaps, and ways to bridge them.

One of the most serious challenges to a better understanding of Islam is the insufficiency of effective and authoritative clarification of many misconceptions which both Muslims and non-Muslims have about Islam. The DIN’s maiden programme for training trainers in tackling critical misconceptions about Islam has been titled the “Train-the-Trainers Course in Islam and Dialogue for Peaceful Co-existence” – usually abbreviated as the “TTC”. The research work and training materials of the Da’wah Institute are reviewed and polished-up by specialist scholars and hundreds of Islamic activists from various parts of the globe.

Nearly two decades of surveys have been carried out by DIN on commonly misunderstood topics and areas of concern within Islam. A major objective of these surveys is to identify the issues that Muslims and those involved in inter-faith work find most challenging to respond to. The surveys are administered to university and secondary school students, new Muslims and *da’wah* activists, Muslims who have distanced themselves from the Muslim community, those who have left Islam, school teachers, inter-faith workers, organisers of Islamic events, lecturers of Islamic Studies and others.

These surveys typically ask respondents which Islamic principles or beliefs (or those of other Muslims) would they describe as “faith-shaking”, “doubt-creating”, “bigoted”, “unfair”, “unjust”, “not in line with compassion”, “unreasonable”, “dogmatic”, “outdated”, “embarrassing to discuss”, “conscience-disturbing”, “extremist”, “repellant and repulsive to sensible non-Muslims”, “frustrating to answer”, “makes people become defensive” and “drives new Muslims away”. Feedback from our surveys have come from over 20 countries on all continents – including Sudan, Kenya, Tanzania, Finland, the United Kingdom, Estonia, the United States,

Australia and New Zealand, Malaysia, Singapore, Sri Lanka, Qatar, Bahrain, and of course, Nigeria.

The results of these surveys converged mainly, but not exclusively, around **interfaith relations**, **gender equity**, the concept of **jihad**, **terrorism**, Shari’ah and **Islamic law**, apparently “irregular” hadith, various aspects of the personal and public life of the **Prophet Muhammad** (ﷺ), and common critiques of **God** and organised religion. These consistently showed up as the areas of greatest intellectual challenge for Muslims who respond to the arguments of various shades of Muslim extremists, non-Muslim critics of Islam, islamophobes, atheists, and especially online Christian Evangelical polemicists. To our surprise, over 95% of “faith-shaking” questions are repeated in every country. Teenagers ask the same questions as adults. More significantly, Muslim activists, entrepreneurs and event organisers are disturbed by the same questions.

The top 150 globally challenging questions identified by DIN are researched and reviewed periodically. The DIN Research Team has focused on obtaining the best answers that have been developed by specialist scholars, both past and present. DIN has ensured, with the support of several advisory scholars, that clarifications are grounded in the traditional sciences and methodologies of *Usul al-Fiqh*, while respecting the objectives (*Maqasid*) of Shari’ah in the context of contemporary realities. The DIN Research Unit has discovered that, interestingly, most of the best responses of contemporary specialist-scholars to specific questions are neither new nor original, but have been articulated centuries earlier by scholars from various schools and contexts.

“**SHARI’AH INTELLIGENCE**” is a new course resulting from the need to handle the distortions of faith experienced by contemporary Muslims which arise from the lack of understanding or neglect of *Usul al-Fiqh* (Principles of Jurisprudence) and *Maqasid al-Shari’ah* (Higher Objectives of the Islamic Path). These are fields that guide and regulate the conduct of *ijtihad* or “juristic reasoning” when responding to new realities and challenges. The role of *Usul al-Fiqh* is to design a consistent methodology and protocols by which a jurist can best represent the Prophet Muhammad (ﷺ) in any societal situation or context, especially when the text of the Qur’an and Sunnah are either inconclusive or silent. Competence in this critical field qualifies a scholar to become proficient to give religious verdicts (as a *Mufti*) or even become a distinguished juris consult (*Mujtahid*).

The term “Shari’ah Intelligence” was conceived to refer to the unique knowledge and skills required to **think** in a manner faithful to the objectives and approaches of the Shari’ah. Shari’ah Intelligence is, in this way, similar to the term “Emotional Intelligence” in that the knowledge and skills used to develop the intelligence must be learned. A number of good books on *Usul al-Fiqh* and *Maqasid al-Shari’ah* have been written in English by scholars such as Mohammad Hashim Kamali, Jasser Auda, Umar Faruk Abd-Allah, Khaled Abou El-Fadl, Tariq Ramadan, Taha Jabir Al-Alwani and a few others. Most of these books may be described as a much deeper introduction to the subject than this present course material. Yet even the books written by the scholars mentioned above only brush over the surface of a dynamic and sophisticated intellectual legacy.

This course does not qualify a participant as anything but being a learner. The eminent Shaykh Abdullah bin Bayyah once said that the field of *Usul al-Fiqh* and *Maqasid* is a large city. If this is so, then going through this course will be like taking a hurried walk through the main street of the city with quick glimpses down the side streets – a quick introduction to a highly expansive territory. Nonetheless, we believe that the glimpse we get is worth the walk. And Allah knows best.

May our journey be blessed!

Muhammad Nuruddeen Lemu

(Director, Research and Training, Da’wah Institute of Nigeria,

Islamic Education Trust, Minna)

December, 2015.

ENDORSEMENTS OF *SHARI'AH INTELLIGENCE*

“This is an excellent piece of pedagogy, made in a simplified yet a very accurate, very illustrative, and very comprehensive way. I sincerely greet everybody who participated in producing this course and teaching it. May you be blessed.

A course on Shariah is more accurately described as a course on the *Fiqh* that explains the Shariah and its *Fiqhi* Schools/*Madhahib*, and theories/*Usul*. But *Fiqh* today falls between two extremes, "literalists" and "liberalists". On the literal side, some people sanctify the letter of the *ijtihad*/reasoning of scholars of old times, even though their reasoning was subject to their place, time and circumstances. At the other extreme, some liberals try to "deconstruct" *Fiqhi* studies altogether or label them as void of wisdom, hence overlooking a rich Islamic juridical scholarship that has been growing for fourteen centuries.

The best way to study *Fiqh* is to differentiate in a balanced way between the divine revelation and the human understanding, the fixed principles and the variable *fatwas*, what should be taken literally and what could be critiqued, and matters of true consensus and matters of different opinions.

This book does exactly that.”

Prof. Jasser Auda
Professor of Maqasid Al-Shariah
Executive Director, Maqasid Institute, London
Head of Dawah, International Union for Muslim Scholars, Qatar

“The book is a good attempt at presenting issues of *maqasid al-Shari'ah* and *usul al-Fiqh* in a concise and clear manner with examples and elaborations relevant to our time. I recommend it for both teachers and students of Islamic Studies.”

Prof. Isa Muhammad Maishanu
Department of Islamic Studies,
Uthman Danfodio University, Sokoto

“The “*Shari’ah Intelligence*” manual is a unique and simple presentation of a most highly technical field of all the Islamic juridical sciences, to wit: *Ilmy al-usulul Fiqh*, and *Maqasid al-Sharee’ah*. It blends the classical discourse with the modern academic methodology of presentation of knowledge in plain language. This focal was successfully accomplished without compromising the flair of the original juristic discussions on *usul* and *maqasid*.”

Dr. Usman Muhammad Shuaibu (Zunnurain)
Head of Department,
Department of Islamic Law,
Bayero University Kano

“The book *Shari’ah Intelligence* is very relevant to contemporary Muslims. It came at a time when many scholars gave verdicts against the intention of Shari’ah, due to lack of proper knowledge of the *Maqasid* of the Shari’ah.”

Dr. Safiyanu Ishiaku
Department of Religious Studies,
Gombe State University

“Most works on the subjects of *Usul al-Fiqh* and *Maqasid al-Shari’ah* are in Arabic. Of the few ones in English on these subjects, *Shari’ah Intelligence* is about the most comprehensive one that both lecturers and students of Islamic Studies and Islamic Law will find very useful.”

Dr. Shaykh Luqman Jimoh
Associate Professor of Islamic Studies.
Kwara State University

“The book is excellent and a very good material for lecturers and students of tertiary institutions.”

Dr. Rasheed AbdulGaniy
Ag. Head, Department of Religious Studies,
Gombe State University

“The knowledge of *Maqasid al-Shari’ah* is an indispensable requirement for the students and lecturers of Islamic Studies in Nigerian universities.”

Prof. Yahya Ibraheem Yero
Head of Department of Religious Studies and
Deputy Dean,
Faculty of Human Management and Social Sciences,
Federal University Kashere, Nigeria

“*Shari’ah Intelligence* is a very educative and comprehensive book on *Maqasid* and *Usul-al-Fiqh*. I believe it will be beneficial to academics, students as well as all other Muslims. I recommend each and every one of you to read it.”

Dr. Aisha Garba Habib
Dean Students’ Affairs,
North-West University, Kano

“The book “*Shari’ah Intelligence*” is a valuable edifice for student of *Shari’ah*, *Usul al-Fiqh* and *Maqasid al-Shari’ah*. I hereby recommend the book for our undergraduate, graduate and post-graduate students.

Abdulkarim O. Kilani
Head of Department, Islamic Studies,
College of Education, Akwanga

“There is no time the ummah needs “*Shari’ah Intelligence*” more than this time when Islamophobia makes some non-Muslims misinterpret Islam and perceive it as static, and that it cannot tackle the challenges faced by humanity in the 21st Century. “*Shari’ah Intelligence*” shows how to demonstrate the relevance of Islam in our time.”

Dr. Aliyu Dahiru Muhammad
International Institute of Islamic Banking and Finance,
Bayero University, Kano

“I want to use this medium to endorse and recommend this book “Shari’ah Intelligence” to all and sundry because of the enormous and diverse knowledge of Shari’ah that is embedded in it. The book is worth reading by all Muslims and non-Muslims because it is actually very educative for everybody.

Dr. Abdullahi Adamu Sulaiman
Head of Department, Islamic Studies,
Nasarawa State University, Keffi

“The book is good for teachers of Islamic Law alongside with the students of Islamic law.”

Mr. Adam Ali Adam
Faculty of Law,
Kogi State University, Anyigba

“I have gone through this book “Shari’ah Intelligence” and I found it to be a useful book for learning and teaching of *Maqasid al-Shari’ah*. It is recommended for various institutions to be used in teaching their students of Islamic Studies, Islamic Law and other related courses.”

Dr. AbdulFatah Kola Makinde
Senior Lecturer,
Obafemi Awolowo University, Ile-Ife

“*Shari’ah Intelligence* is a must-read book especially for those interested in da’wah work, teaching or learning Islamic Studies and Islamic law. It is also a pre-requisite reference material for those specializing in Islamic Finance and Economics. In fact, I recommend this book to every one interested in understanding the purpose and objectives of the Shari’ah.”

Dr. Ahmad Bello Dogarawa
Islamic Finance Consultant and Head of Department,
Department of Accounting,
Ahmadu Bello University, Zaira

“For those with a penchant for knowledge about the dynamics, excellence and general workings of the Shari’ah, they have got a sophisticated answer in “Shari’ah Intelligence”. Rich in content, unique in style, convincing in arguments, penetrating in logic and apt in examples; the book presents most of the important aspects of its subject matter using simple and logical style.

“It is no doubt a unique addition to the ever growing literature on *Maqasid al-Shari’ah* which no scholar, student, judge, Muslim activist, da’wah worker, or researcher on Islam can afford not to have.”

Abdullahi Abubakar Lamido
Deputy Director Training,
International Institute of Islamic Thought (IIIT), Nigeria Office,
International Institute of Islamic Banking and Finance (IIBF),
Bayero University Kano

“I love this book “*Shari’ah Intelligence*” ...a well-chosen title. A scholar’s manual, a guide for the student of learning and a stabilizer for today’s youth who have become “*Shuyuukh*” of circumstance with the burning passion to propagate *deen*.”

Sheikh Shareef Mayaleeke
Director of Studies,
Ad-Dawah Islamic Education Centre, Ijebu-Ode, Nigeria

“This training manual “*Shari’ah Intelligence*” is indeed irresistible, not just because of the rare and moving candor of its presentations, but its timeliness and potency to correct lots of misconceptions and put *da’wah* in its proper perspectives.”

Dr. Owoyele Jimoh Wale
Tai Solarin University of Education, Ijagun
Ijebu-Ode, Nigeria

“The appropriation of this “*Shari’ah Intelligence*” can never in any sense be over-emphasized because of its irresistible need in the present age of knowledge and intellectual challenges. The uniqueness of Allah’s guidance in the holy Qur’an must not be hidden.”

Shaikh Abdur-Rasheed Folajuwon Mayaleeke
The Nigerian Supreme Council for Islamic Affairs (NSCIA)
Chairman, Ogun State chapter

“*Shari’ah* Intelligence is a literature material of immense value. I found the contents very comprehensive and highly stimulating. The reader wants to keep its pages open until he drifts into slumber. Nor does he want to part with the book even after perusing the last page. It gives all the vital information anybody may seek to know about *Shari’ah*: from the *maqasid* to *usul al-fiqh*, the sources of *Shari’ah* and the *mujtahid* factor. Issues are discussed in simple language thus making it easy to understand even for beginners and non-Muslims. The reviews at the end of each section serve as reminders and quick reference points in future. *Shari’ah* Intelligence is not designed to gather dust on the shelves, nay, it is a mobile companion for every Muslim and *sine qua non* among *Shari’ah* literature materials.”

Prof. Ishaq Akintola
Professor of Islamic Eschatology
Lagos State University

...and all praise belongs to Allah!

INTRODUCTION

“Shari’ah Intelligence: The Basic Principles and Objectives of Islamic Jurisprudence” is also known as “TTC 001”. It is the primer for all other “TTC” courses conducted by the Da’wah Institute of Nigeria. The course focuses on an introduction to the Principles of Islamic Jurisprudence (*Usul al-Fiqh*) and the Objectives (*Maqasid*) of Shari’ah and its relevance for contemporary societies.

Usul al-Fiqh refers to the way in which rules of law and jurisprudence are inferred and extracted from their Islamic sources. Its study involves the sources of evidence, tools for interpretation and maxims that guide legislation. *Usul al-Fiqh* is the canonised science that regulates the practice of formulating opinions in the name of Islam (*ijtihad*).

The term *Maqasid* refers to the aims, higher intents and objectives of Islamic principles or *Shari’ah*. The field of *Maqasid al-Shari’ah* is concerned with the wisdom behind the rulings of *Shari’ah*. The *Maqasid* are those good ends that the law aims to achieve by blocking or opening certain means.

Together, these fields provide tools for scholars to navigate their path as they seek to represent the Prophet (ﷺ) when determining what is in harmony with the teachings of Islam. This becomes especially important where the Qur’an and Sunnah are silent or ambiguous, and where *ijtihad* is therefore needed. Understanding the basics of this field enable the student to also understand and appreciate better the path followed by scholars as they formulate their various rulings and verdicts.

The Shari’ah Intelligence course has been divided into 2 parts. Both parts cover 46 lessons in all. Part 1 covers *Usul al-Fiqh* (The Principles of Islamic Jurisprudence) and is comprised of Section 1-5; Part 2 covers *Maqasid al-Shari’ah* and is comprised of Section 6 – 8.

The first section is titled “Representing the Messenger: A Consistent Methodology”. It outlines the evolution of a consistent methodology of Islamic jurisprudence from the period of the Prophet’s Companions to the period of the Followers of the Successors of the Prophet’s Companions. This section ends with a description of five to seven categories of liability in the *Shari’ah*.

The second section, “In Search of the Straight Path: The Mujtahid’s Tools and Principles”, covers 12 “sources” of evidence used to formulate Islamic law. This section also discusses similarities and differences between the Schools of Jurisprudence with regard to the evidence and tools each School considered or ‘considers’ valid for legal deduction.

The third section, “In Search of Certainty” highlights the great moral weight of declaring an action compulsory (*fard*) or prohibited (*haram*), and that doing so on the basis of uncertainty is tantamount to assuming equality with the Ultimate Law-giver, which effectively is an act of ascribing divinity to other than Allah (*shirk*). The section elaborates that a significant degree of certainty needs to be obtained on both the level of the authenticity or credibility of texts or “sources” and on the level of the meanings or implications of those “sources” of law.

In the fourth section, “Separating the Eternal from the Historical”, distinction is made between the terms “*Sunnah*” and “*Seerah*”. Ibn Ashur’s categorisation of 12 types of “Prophetic intent” is also explored to demonstrate how jurists may consider the various acts of *Sunnah* with different degrees of legal relevance. This helped the jurists in reducing the error of generalizing the legislative implications of hadith that were context-specific and not intended by the Prophet (ﷺ) to be applied outside those contexts.

Section five is on the “The Code of the *Mujtahid*: Terms of Engagement with Reality” and describes some important maxims of Jurisprudence as well as disagreement among scholars over the concept of blameworthy innovation (*bid’ah*). This section ends the *Usul al-Fiqh* part of the course. Participants would by this stage have a basic comprehension of the classical or traditional approaches to legal deduction in *Shari’ah*, and how differences in legal rulings between scholars are often a direct result of the diversity of acceptable methods within *Usul al-Fiqh*.

The second part of the course begins with section six, “The Aims and Objectives of *Shari’ah*”. This section discusses what the *Maqasid* are, their authority and importance in jurisprudence, and the extent to which they may be applied in both devotional worship and social dealings.

Section seven’s “*Maqasid* as a Compass on the Map of *Usul al-Fiqh*” explains that despite the importance of *Usul al-Fiqh* in *Shari’ah*, *Maqasid al-Shari’ah* plays an overarching role as it directs the application of *Usul al-Fiqh* within any given society or context. This helps in ensuring that the clear objectives and higher purposes of the Qur’an and *Sunnah* are not undermined by juristic

reasoning (*ijtihad*) and the scholars' interpretations of the various sources of legislation, but serve as a compass by giving guidance to juristic undertakings.

The last section is on “Engaging Diversity in the Search for Truth”. It ties previous sections together by providing guidance for the reconciliation or management of different opinions. This section re-affirms the importance of humility and curiosity in seeking answers to the Truth, of respecting dissent and the need to maintain ties of fellowship and brotherhood that reach across divergent methods and opinions as contemporary scholars strive to find solutions to the various challenges facing humanity, thereby respecting the wise and compassionate flexibility of Islamic legal thought.

WELCOME TO THE COURSE!

Assalamu 'alaikum, and welcome to the ***Shari'ah* Intelligence** Course. We are very pleased to have you on board!

We live in an age dominated by instant information. At the click of a button, we receive a deluge of data – some accurate, some inaccurate. The onslaught of divergent opinions and analyses, combined with our lack of time to digest it all, can wreak havoc on our faith. Globalisation, the internet and travel have made it more commonplace to meet people with different opinions and experiences which influence how they and we perceive Islam and its teachings. We are sometimes left confused and frustrated, wishing there was some way to understand exactly how all the rulings that are said to constitute *Shari'ah* fit together and to understand the place of *Shari'ah* rulings in our current milieu. This course was designed to do just that.

Shari'ah Intelligence is the ability to navigate the often complex and divergent opinions that stem from scholars of different generations and Schools of Juristic Thought. This course helps to build a greater appreciation about how competent Muslim jurists understand the *Shari'ah* and use its principles to formulate methods of deriving general and specific rulings.

Hundreds of Muslims in Nigeria, Malaysia and Australia have already taken this course. These participants have reported feeling more confident in their understanding of *Shari'ah* and its place in the modern world. They have also reported being more comfortable reading about, and having discussions with, people who hold different or even new opinions.

As human beings, there are undoubtedly mistakes that we have missed detecting. If you discover any of these or wish to suggest any additions or modifications, kindly send us an email at dawahinstitute@gmail.com to inform us so that we may take prompt action.

May Allah reward you for your intention and guide us all in our understanding!

SECTION 1: REPRESENTING THE MESSENGER: A CONSISTENT METHODOLOGY

LESSON 1: OBJECTIVES AND EXPECTATIONS

The major objectives of this course are:

- To introduce Muslim activists, students, academics and those involved in *da'wah* to the classical methodologies of juristic reasoning and the formulation of *fatwas*.
- To enable participants understand why scholars differ in their verdicts.
- To assist those new to Islamic jurisprudence understand the nuanced language and terminologies used by scholars, and how to be more precise in articulating their questions for the consideration of scholars, and in critiquing of the arguments and answers given.
- To equip participants with the necessary knowledge for identifying verdicts which have not been formulated using classical methodologies.
- To explain how scholars reconcile their opinions with the higher purposes and intents of the *Shari'ah*.
- To empower participants with knowledge of what actions may be taken when scholars differ on a particular issue.
- To understand why Muslims should have greater respect for diversity of opinions and multiple approaches to derivation from texts.

Discussion Question:

1. Discuss with colleagues your **personal objectives** for attending this course and what you expect to benefit from it. Write down some of the most important of these.

2. Fill in the following table with at least five things you already know about the Basic Principles (*Usul al-Fiqh*) and the Objectives (*Maqasid*) of Islamic Jurisprudence, and five additional things you want to know. At the end of the course, you may also add five new things you have learned in the last column.

I already know:	I want to know:	I have learned:

LESSON 2: WHAT IS *USUL AL-FIQH*?



The literal meaning of *usul al-fiqh* is “roots” or “**foundations**” (*usul*) of Islamic jurisprudence and understanding (*fiqh*). Without “roots”, there would be no deep understanding and no well-directed development of the field of Law or Jurisprudence (*Fiqh*).

- *Usul al-Fiqh* refers to the **well-organized, all-inclusive and organically structured legal methodology** for extracting legal judgments from the established legal sources, namely, the Qur’an and the Sunnah of the Prophet Muhammad (ﷺ).²

• Technically, *Usul al-Fiqh* means “the fundamental principles of Islamic law.... (It) expounds **principles and methodology by means of which rules of law and jurisprudence are inferred and extracted from their sources**. It involves the study and formulation of rules of interpretation, obligation, prohibition and global principles, *ijtihad*.”³

- *Usul al-Fiqh* provides the ground-rules for **respectful interaction between reason and revelation**.
- *Usul al-Fiqh* generates **consistent methodologies of interpretation of Islamic sources that regulate the practice of *ijtihad*** (juristic reasoning) used by a jurist (*mujtahid*)⁴ or School of Juristic Thought (*madhhabs*).⁵

² Wan Azhar Wan Ahmad, *Public Interests (Al-Masalih Al-Mursalah) in Islamic Jurisprudence: An Analysis of the Concept in the Shafi’i School*, ISTAC & IIUM, Kuala Lumpur, Malaysia, 2003, p.91.

³ Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation*, Oxford University Press, Oxford, 2009, p.360.

⁴ See the qualifications of a *mujtahid* in the discussion on “Scholars and their Specialisations” in Lesson 43.

⁵ *Ibid.*; Abdul Hakim Murad, *Understanding the Four Madhhabs*, The Muslim Academic Trust, Cambridge, 1999; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, the Islamic Text Society, Cambridge, 2003, p.1-4

Ijtihad refers to the intellectual endeavour by individual jurists to extract solutions to individual and societal problems that are not explicitly addressed in the texts of the Qur'an or Sunnah. It is the vehicle by which rules of behavior not explicitly addressed to new and evolving situations are determined. It is what a *Mujtahid* does. *Ijtihad* is exercised through the earlier consensus of jurists (*ijma'*), analogy (*qiyas*), juristic preference (*istihsan*), public interest (*maslahah*), and customs (*'urf*), etc.

According to Kamali, "*Ijtihad* is the most important source of Islamic law next to the Qur'an and the *Sunnah*. The main difference between *ijtihad* and the revealed sources of the *Shari'ah* lies in the fact that *ijtihad* is a continuous process of development whereas divine revelation and prophetic legislation discontinued upon the demise of the Prophet. In this sense, *ijtihad* continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community in its aspirations to attain justice, salvation and truth."

- *Usul al-Fiqh* is a science that enables contemporary legal verdicts (***fatwas***) to be issued by councils of scholars who are responsible for responding to contemporary challenges.⁷
- It is a science that facilitates the analysis and evaluation of *fatwas*, to ensure that the Prophet (ﷺ) is accurately represented by a scholar or jurist (*faqih*⁸, *mujtahid* or *mufti*).⁹
- *Usul al-Fiqh* is, therefore, a science which ensures that the Ummah is protected from fanciful interpretations and heretical innovations (*bid'ah*).

According to Professor Mohammad Hashim Kamali,

The principal objective of *Usul al-Fiqh* is to regulate *ijtihad* and to guide the jurist in his effort at deducing the law from its sources. The need for the methodology of *Usul al-Fiqh* became prominent when unqualified persons attempted to carry out *ijtihad*, and the risk of error and confusion in the development of *Shari'ah* became a source of anxiety for the *ulema*. The purpose of *Usul al-Fiqh* is to help the jurist to obtain an adequate knowledge of the sources

⁶ Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, the Islamic Text Society, Cambridge, 2003, p.468.

⁷ Musa bin Muhammad bin Yahya al-Qarni, *Murtaqa al-Usul Ila Tarikh Ilm al-Usul*, p.5, Madina, 1414 AH

⁸ A specialist in Islamic Jurisprudence (*Fiqh*)

⁹ Ibn Qayyim, *I'lam al-Muqaqqi'in*, vol. 1, p.10

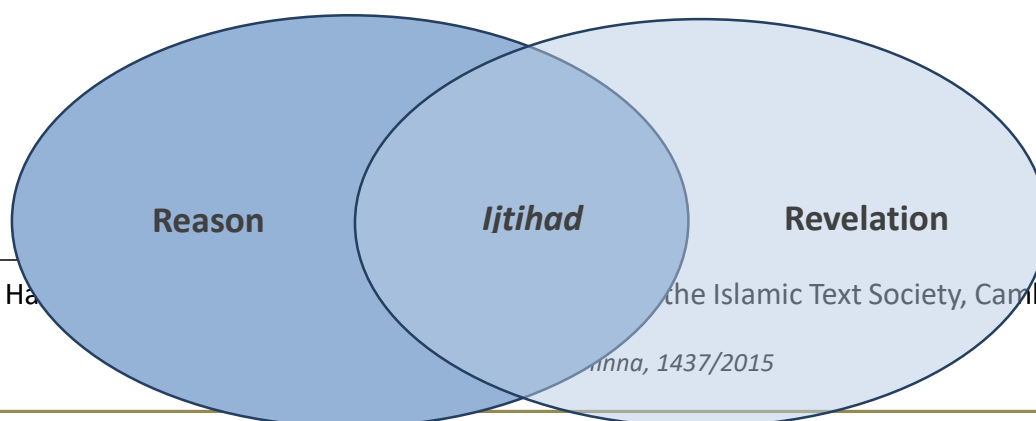
of *Shari'ah* and of the methods of juristic deduction and inference. *Usul al-Fiqh* also regulates the application of *qiyas*, *istihsan*, *istishab*, *istislah*, etc., whose knowledge helps the jurist to distinguish as to which method of deduction is best suited to obtaining the *hukm shar'i* of a particular problem. Furthermore, *Usul al-Fiqh* enables the jurist to ascertain and compare strength and weakness in *ijtihad* and to give preference to that ruling of *ijtihad* which is in close harmony with the *nusus*" (i.e., texts of the Qur'an and *Sunnah*).¹⁰

So, while *ijtihad* is WHAT the jurist does, *Usul al-Fiqh* guides or regulates HOW and WHY it is done.

Reason and Revelation: Eyes and Light

Imam Abu Hamid al-Ghazali described the relationship between reason and revelation as similar to that between the eyes and light. To insist on using ones' intellect or reason without the aid of revelation is similar to a person moving around with their eyes open but in the dark. In a similar vein, to insist on following the guidance of revelation without the assistance of reason, is similar to a person moving around in broad daylight, with their eyes shut. Both reason and revelation are gifts from Allah to guide us, so both should be used together to gain true insight. The synthesis of reason and revelation is the basis of *ijtihad*, and *ijtihad* is regulated by *Usul al-Fiqh*.

From this perspective, *Ijtihad* is seen as the point of convergence between *reason* and *revelation*.



¹⁰ Mohammad Haq, *Usul al-Fiqh*, The Islamic Text Society, Cambridge, 2003, p.4
Ijtihad, 1437/2015

- In *Fiqh*, we learn the values or rulings regarding desirability (e.g. compulsory, recommended or merely permissible) or undesirability (e.g. discouraged or forbidden) that Islamic Jurisprudence or law places on various beliefs and actions – “the Shari’ah Rulings” - *al-Ahkam al-Shar’iyyah*. This will be covered in more depth in Lesson 5.
- *Usul al-Fiqh* enables scholars to **deduce with a reasonable degree of certainty what level of desirability or undesirability** to assign to every aspect of our lives, based on the guidance of divine revelation (Qur’an), its implementation in the life of the last Prophet (i.e. the *Sunnah*) or *Ijtihad*.

So, while the study of *Fiqh* (and *fatwahs*) focuses on the “answers” and “verdicts”, *Usul al-Fiqh* focuses on the “equations” and how they are derived and applied under various contexts.

In the “Islamic Sciences” sound reason plays a critical role in at least 5 major areas or fields:

1. The verification of the historical authenticity of information/revelation – Is it really from God or from His Prophet?;
2. the understanding of the meaning and implications of the Arabic language of revelation;
3. the appreciation of the wisdom and purposes of revelation;
4. the thoughtful and correct application of its guidance to achieve its objectives; and in
5. the defence of truth against falsehood using better arguments and superior reasoning.

DISCUSSION QUESTIONS:

1. What is meant by the term *Ijtihad*?

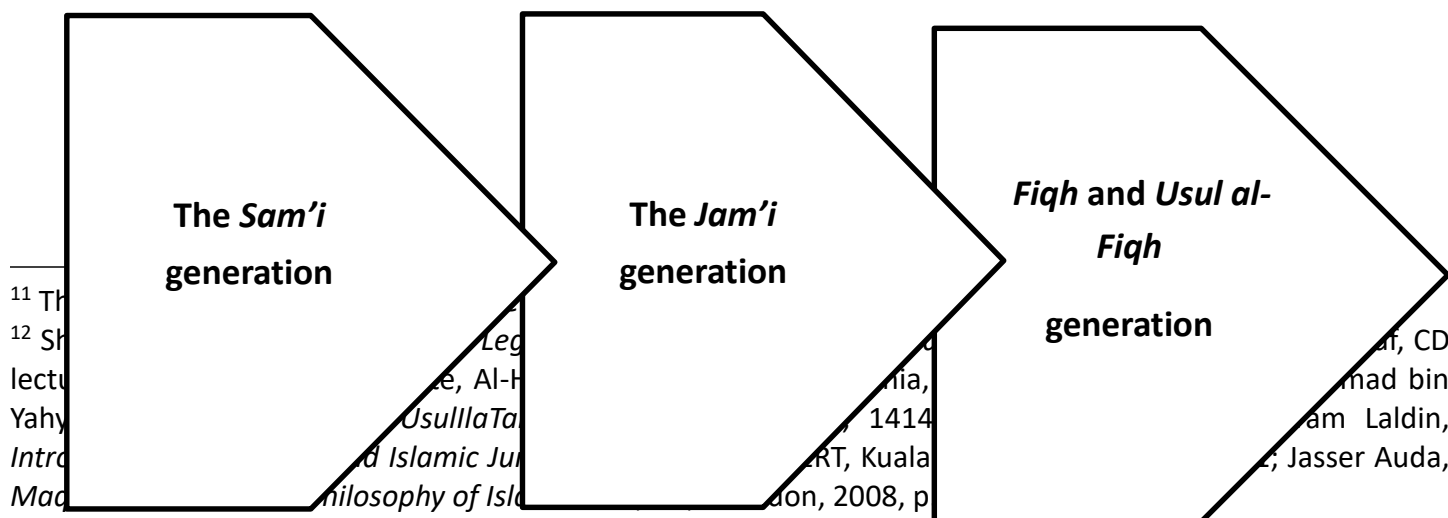
2. What is meant by *Usul al-Fiqh*?
3. What is the relationship between *Usul al-Fiqh* and *Ijtihad*?
4. What is the difference between *Fiqh* and *Usul al-Fiqh*?
5. What are some goals of *Usul al-Fiqh*?
6. Explain why *Usul al-Fiqh* is important.
7. Why is it detrimental to engage in *Fiqh* without understanding *Usul al-Fiqh*?
8. Explain Abu Hamid Al-Ghazali's metaphor for the relationship between reasoning and revelation.
9. Discuss 5 roles of reasoning in the Islamic Sciences.
10. What is an example of a contemporary issue that warrants an Islamic legal ruling?
11. Have all online *fatwas* been developed using the formulations of *Usul al-Fiqh*?

LESSON 3: THE EVOLUTION OF *USUL AL-FIQH*

1. **The Generation of *Sam'i* – of listeners, eye witnesses:** This was the generation of the Companions of the Prophet (ﷺ) who saw, heard and lived with him. They witnessed

the revelation and application of the Qur'an and *Sunnah*. They observed how he handled cases that were not responded to directly by revelation. They had the entire Qur'an transcribed. Many of the Companions spread out into the rest of the *Ummah* after the death of the Prophet (ﷺ) to teach and guide people. This period lasted till approximately the end of the first *Hijrah* century.

2. **The Generation of *Jam'i* – of gatherers, collectors:** This was the generation of the students of the companions of the Prophet. They were taught by the Companions who learned directly from the Prophet (ﷺ). They gathered what they learnt from the companions in book form. They were the *Tabi'in* (the Followers of the Companions of the Prophet (ﷺ)).¹¹
3. **The Generation of *Fiqh* and *Usul al-Fiqh* – of analysts and jurists:** This is the time of the Successors or Followers of the Followers of the Companions of the Prophet (ﷺ), the *Tabi'u al-Tabi'in*. It was during this period that a codified system of analysing Islamic law was developed, based on what the *Tabi'u al-Tabi'in* heard from their teachers who were taught by the companions of Prophet (ﷺ). While earlier jurists employed well-developed principles and methodologies that guided their juristic reasoning (*ijtihad*), the first writing and articulation of *Usul al-Fiqh*¹² as an independent science was done by **Imam Shafi'i**.



¹¹ The

¹² Sh

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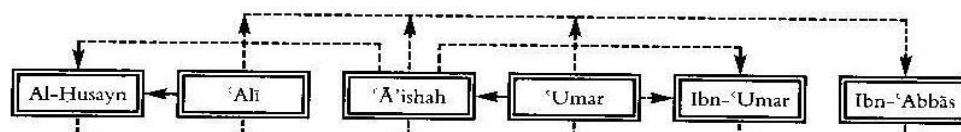
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Fiqh is an Arabic term which literally means “deep understanding” but has come to denote the broad field of Islamic Jurisprudence. **The great jurists**, Imam Nu‘man bin Thabit Abu Hanifa (d. 150 AH), Imam Malik bin Anas (d. 179 AH), Imam Muhammad bin Idris Shafi’i (d. 204 AH) and Imam Ahmad bin Hanbal (d. 241 AH) **were scholars of *Fiqh*. The chart below shows their line of teachers.**

Chart 3.4. Chains of students who eventually formed the schools of Islamic law, starting with (a selected group of) the companions and ending with (a selected group of) the *uṣūlis*.

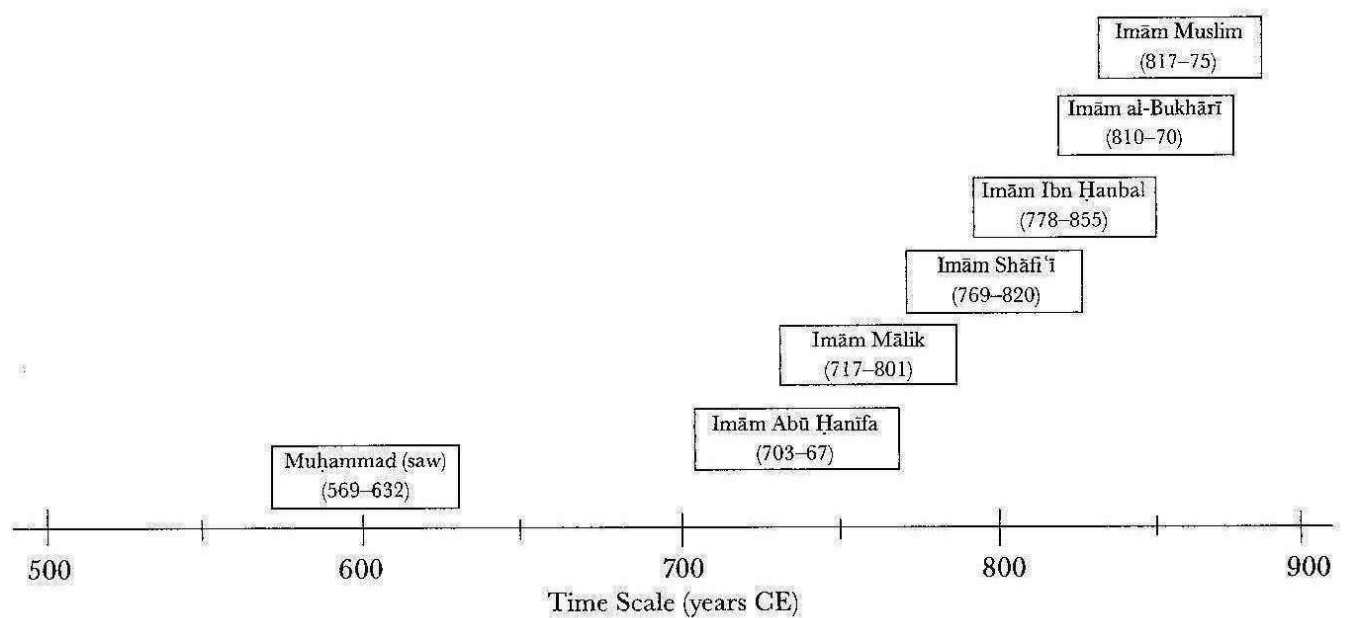


Source: Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, Herndon, 2008, p.72

The chart below shows the lapse of time between the Prophet Muhammad (ﷺ)'s life and period of the development of *Fiqh*, derived using *Usul al-Fiqh*. **Imam al-Bukhari** and **Imam**

Muslim were not well known as *fuqaha*¹³ but as later compilers and authenticators of oral and written traditions (Hadith).

Chart II: **The Era of the Early *Fuqahā'***



Source: Tariq Ramadan, *To Be a European Muslim*, The Islamic Foundation, Leicester, 1999

LESSON 4: LET'S REVIEW!

¹³ Plural of *faqih* – a specialist in Islamic Jurisprudence. Though some scholars regard Imam Bukhari as also being a *Mujtahid*. See Gibril Fouad Haddad, *The Four Imams and their Schools*, Muslim Academic Trust, London, UK., nd., p.iix

Terminology:

In this section, we will review all the terms we have come across so far. How many can you remember? Test yourself by covering the definitions on the right hand side.

TERMS	MEANING/EXPLANATION
1. <i>Generation of Sam'i</i>	Generation of "listeners", eyewitnesses, Companions
2. <i>Generation of Jam'i</i>	Generation of "gatherers", collectors (of hadith), Successors of the Companions
3. <i>Tabi'un</i>	Followers of the Companions of the Prophet
4. <i>Tabi'u al-Tabi'in</i>	Followers of the Successors of the Companions of the Prophet
5. <i>Fiqh</i>	Literally, deep understanding; technically, Islamic Jurisprudence
6. <i>Usul al-Fiqh</i>	Literally, the roots of Islamic Jurisprudence; technically, the study of the principles, proofs and methodologies through which Islamic rulings are inferred
7. <i>Ijtihad</i>	Juristic reasoning, to deduce rulings that are not explicitly stated in the Qur'an and <i>Sunnah</i>
8. <i>Mujtahid</i>	A distinguished jurist; one who is qualified to engage in <i>ijtihad</i>
9. <i>Madhhab</i>	A school of juristic thought. School of legal theory or law
10. <i>Fatwa</i>	A religious answer, verdict or ruling given by <i>amujtahid</i> or a <i>mufti</i>
11. <i>Faqih</i>	A specialist in Islamic Jurisprudence (<i>Fiqh</i>)
12. <i>Mufti</i>	A scholar authorised to give specific religious answers or verdicts (<i>fatwas</i>) for the people of a geographical area
13. <i>Bid'ah</i>	Innovations, usually blameworthy innovations in religion or heresy
14. <i>Ahkam al-Shar'iyyah</i>	Value-judgments or rulings of the Shari'ah

DISCUSSION QUESTIONS:

1. List the 3 main historical phases in the evolution of *Usul al-Fiqh* and their main topics and contributions to the field.
2. Would it be correct to describe Imam Shafi'i as the founder of *Usul al-Fiqh*?
3. List the 4 major *Sunni Imams* in their chronological order.

LESSON 5: *SHARI'AH* RULINGS

Issue



Issues requiring a religious ruling or verdict (*hukum* or *fatwah*) are processed by scholars using the methodology and tools of *Usul al-Fiqh*. The products of this process are their “*Shari’ah* rulings” (or *Al-Ahkam al-Shar’iyyah* or *Al-Ahkam Al-Taklifiyyah*) which determine the level of accountability, and legal or moral responsibility of a believer on a particular issue. These rulings only apply to Muslims with legal responsibility - i.e. one who is above the age of maturity, free from bondage, and is of sound mental health. These “*Shari’ah* rulings” (*Al-ahkam al-Shar’iyyah*) are the terms used to describe the value and degree of desirability or otherwise of a thing or action.

The rulings are broadly classified into the following categories¹⁴:

1. ***Fard or Wajib*** – compulsory, obligatory, and sinful if omitted. This category is the opposite of *haram* which is sinful if committed. Some of these are individual obligations (*fardu ‘ayn*) while others are social or collective obligations (*fardu kifaya*).

Examples include the five daily prayers, giving *zakat*, being just, telling the truth, fulfilling responsibilities, keeping oaths, burying the dead, ensuring security, basic education, and avoiding *haram*, etc.

¹⁴ Muhammad bin Salih bin al-Uthaimeen, *al-Usul min ‘Ilm al-Usul*, Egypt, 2001, p.7

2. *Mustahab or Mandub* – Recommended, encouraged, liked, praiseworthy, rewarded if performed but not punished if omitted. It is the opposite of *makruh*.¹⁵

Examples include supererogatory (*nafilah*) prayers and fasting outside Ramadan, tree-planting, charity (*sadaqa*), forgiveness, greeting others, marriage, cleanliness, and supporting good initiatives, etc. It also comprises ‘instruments’ and acts that facilitate attainment of a *fard/wajib*, such as being in a state of *wudu* outside the times for *salat*, match-making for marriages, building mosques, and memorizing the Qur’an.

3. *Mubah or Ja’iz* – Permissible, neither encouraged nor discouraged. Most issues and acts belong to this category because the legal premise or assumption underpinning any issue in Islam is that of permissibility, and also because the texts of the Qur’an and *Sunnah* are silent on many specific issues.¹⁶ This premise of assumed or original permissibility is expressed by scholars in a legal maxim as: *al-asl fi al-ashya al-ibahah* – “the original premise of things is that of permissibility” – which is in turn based on the authority of numerous texts of the Qur’an and Hadith.¹⁷

The intention behind an act that is ordinarily *mubah* or *ja’iz* and the consequences of such an act may, however, elevate that act to the category of *mustahab* or relegate it to *makruh* (see definition below).

Examples of areas considered *ja’iz* include choice in some technological innovations, games, entertainment and leisure, cultural dishes and cuisine, cultural dressing; choice of health care systems, security systems, educational systems, political systems, architecture, ethnic names and languages, etc. – These are all permissible by default, so long as nothing in them contradicts clear Islamic injunctions or objectives. As mentioned earlier, whatever facilitates or leads to the attainment of goodness or benefit (*maslahah*) or an objective (*maqasid*) of Shari’ah will be encouraged (*mustahab*).

¹⁵ Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.12.

¹⁶ Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.13.

¹⁷ As will be discussed in more detail in Lesson 31.

4. **Makruh** – Discouraged, disliked but tolerated, rewarded if omitted but not punished if committed. It is the opposite of *mustahab*.¹⁸

Examples include over-eating, untidiness, having bad breath, miserliness, disputation, and avoiding *mustahab*. It also comprises ‘instruments’ and acts that facilitate *haram*.

5. **Haram** – Forbidden, prohibited, and sinful if committed. This category is the opposite of *Fard*. In common usage, it is also the opposite of *halal* which means permissible.

Examples include murder, theft, *riba* (usury/interest), *shirk* (associating partners with God), extra-marital sexual relations, back-biting, deception, gambling, injustice, ethnocentrism, racism, corruption, intoxication, terrorism, arrogance, ingratitude, cruelty to animals, insults, wastefulness, avoidance of *fard* (obligatory) responsibilities, etc.

The term **halal** may be used to refer to the first 4 categories as these are all permitted to varying degrees.

In Islamic legal law, greater attention is paid to the category of *fard /wajib* and that of *Haram*, as these entail a sin by omission or commission respectively. As a rule, courts are only concerned about legal breaches that fall under these two categories. However, considerable scope is granted to individual governments to determine what is enforceable in a society’s legislation and what is not. Not everything that is regarded as *haram* (in worship or social transactions) for example is regarded as a penal or punishable offence by a court. It should be noted that rewards and penalties for most actions in Islam are left with Allah.

Ideally, Muslims should take an interest in rulings for their own personal development and the wisdom and benefit that such prescriptions offer. With greater spiritual growth, believers focus not just on what is *Fard* and *Haram*, but on avoiding the category of *makruh* and doing more actions in the category of *mustahab/mandub*.

¹⁸ Muhammad bin Salih ibn al-Uthaimeen, *al-Usul min Ilm al-Usul*, Medina, 1426 AH p.12; Imam al-Haramayn al-Juwayni, *Matn al-Waraqat*, 1996 Dar al-Samai’, Riyadh, n.d., p. 7; Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.13; etc.

Hanafi Classification: Seven Rulings

The five categories listed above are broadly accepted by all *madhhabs*. In the Hanafi School's classification, however, there are two additional rulings based on distinctions within two categories.

For example, there is a **nuanced distinction between *fard* and *wajib***. *Fard* is established only by conclusive evidence from explicitly clear (*qat'i al-dilalah*) and undisputedly authentic text ("*qat'i al-wurud*" or "*qat'i al-thubut*") - i.e., from the Qur'an or multiple-chained (*mutawatir*) hadith. *Wajib*, however, may be established by indefinite evidence in meaning (*zanni al-dilalah*) and/or text of probable (*zanni*) authenticity - i.e., from single-chained (*ahad*) hadith. This distinction between multiple-chained and single-chained hadith is significant because the latter does not provide absolute certainty of knowledge (*ilm al-yaqeen*).¹⁹ The combinations of *qat'i* and *zanni* as applied to *al-thubut/al-wurud* and *al-dilalah* will be discussed in more details in Lesson 34. As with all the other Schools of Jurisprudence (*madhahib*) the Hanafis regard the 5 daily prayers as belonging to the category of *fard*. They however regard the *witr* prayer (after the night prayer – 'Isha) as *wajib*, while others regard it as *mustahab* or *nafilah*.²⁰

The Hanafi School also distinguishes between 2 types of *Makruh*: ***makruh tahrimi*** and ***makruh tanzihi***. The more serious is *makruh tahrimi* which is considered a minor sin if committed. This category can be established by single-chained hadith (*hadith ahad*, also referred to as *khbar wahid*). *Haram* in the Hanafi classification is only established by the Qur'an or *hadith mutawatir* that meets the requirements of certainty. *Makruh tanzihi* is similar to the "*makruh*" in the classification of most of the other jurists, and is not sinful if committed.²¹

¹⁹ Abdullah bin Yusuf al-Judayy, *TaysirUsul al-Fiqh*, p.34; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, the Islamic Text Society, Cambridge, 2003, p.421; Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008 p.13; Ahmad Hasan, *The Principles of Islamic Jurisprudence: The Command of the Sharia and Juridical Norm*, Adam Publishers, New Delhi, 2005, p.38, 40-77, 130-133.

²⁰ Ibn Rushd, *Bidayat al Mujtahid*, vol.1

²¹ Ahmad Hasan, *The Principles of Islamic Jurisprudence: The Command of the Sharia and Juridical Norm*, Adam Publishers, New Delhi, 2005, p.133

Below is the common Hanafi classification²²:

1. **Fard** - compulsory, obligatory with absolute certainty and sinful if omitted
2. **Wajib** – necessary, sinful if omitted
3. **Mustahab** or **Mandub** – encouraged, liked
4. **Mubah** – permissible, neither encouraged nor discouraged
5. **Makruh Tanzihi** – discouraged, disliked but tolerated, not sinful
6. **Makruh Tahrimi**– wrongful, sinful if committed
7. **Haram** – Forbidden, prohibited with absolute certainty and sinful if committed

DISCUSSION QUESTIONS:

1. What is the relationship between *Usul al-Fiqh* and the *Ahkam al-Shar'iyyah*?

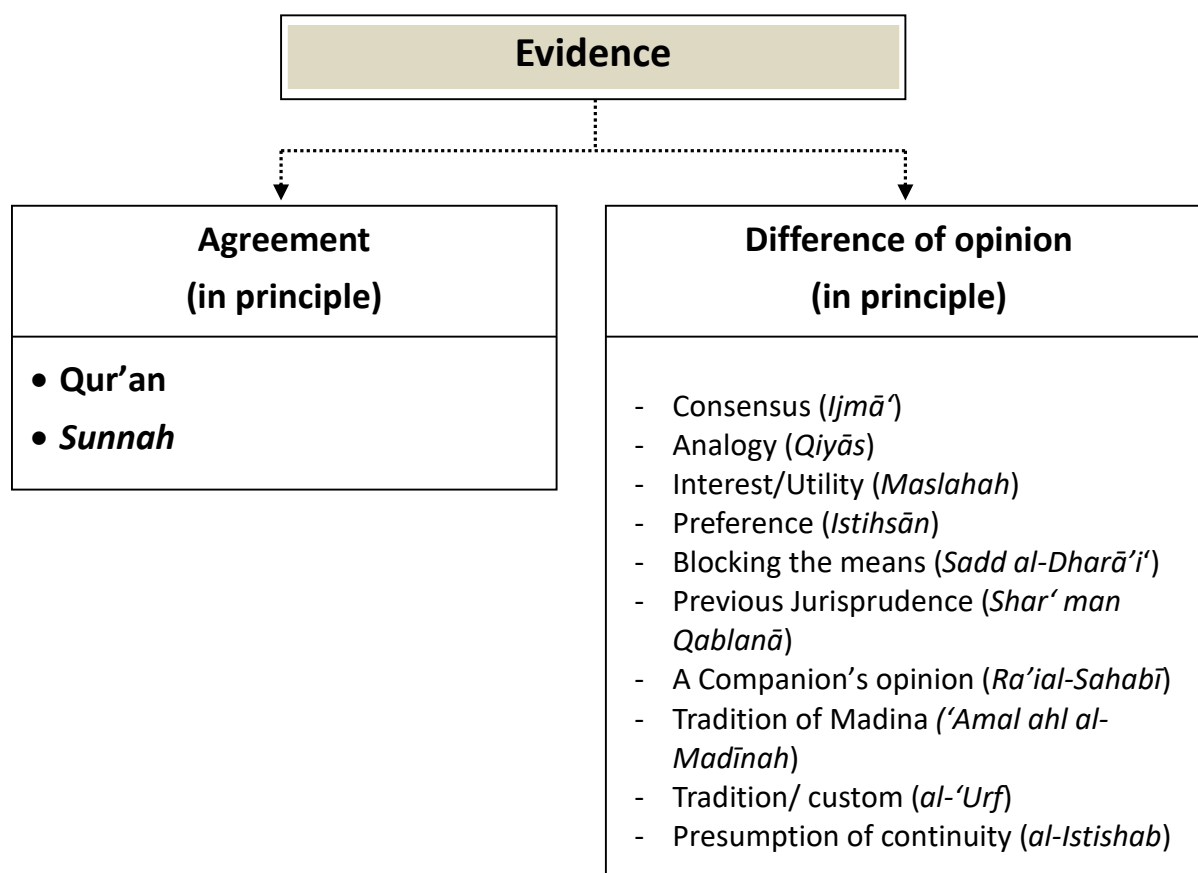
²² Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008p.13; See also Musharraf Hussain, *The Five Pillars of Islam*, Kube Publishing, 2012, p. 29-31, for another more nuanced Hanafi classification into 11 categories. Imam al-Haramayn al-Juwayni, a Shafi'i jurist presents 7 categories. See Mahmud Adam, *Introductory Studies in Usul al-Fiqh: An Annotated Translation of Imam Al-Haramayn's Waraqaat*, The Imam Shafi'i Bookstore, London, 2014, p.3.

2. List the 5 main value judgments (*Ahkam al-Shariyyah*) and give 3 examples of each.
3. What is the main distinguishing feature of the *Fard* and *Haram* category? What do they have in common and why are they important in legal law?
4. What do *Mustahab* and *Makruh* have in common and how are they differing?
5. In Hanafi Fiqh, list 2 possible differences between *Fard* and *Wajib*.
6. What is the difference between *Makruh Tanzihi* and *Makruh Tahrimi*?
7. What are the major differences between *Makruh Tahrimi* and *Haram*?
8. Explain the differences between a *Fatwa* and a *Hukmu Shar'i*.

SECTION 2: IN THE SEARCH OF THE STRAIGHT PATH: THE *MUJTAHID'S* TOOLS AND PRINCIPLES

LESSON 6: SOURCES OF EVIDENCE IN ISLAMIC LAW

Islamic Jurisprudence uses primary and secondary sources of evidence to formulate law. These are also called legislative tools. When primary sources contain indefinite meanings, secondary sources and tools may be used to provide evidence for a ruling. The various schools of Juristic thought (*Madhhabs*) differ regarding which secondary tools they endorse to provide evidence and how the endorsed tools are ranked in terms of prominence.



A chart of 'evidence' and classification according to their endorsement (in principle) within the Schools of Islamic law: Source: Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, Herndon, 2008, p.77

DISCUSSION QUESTIONS:

1. List those sources of *Shari'ah* (or evidences) which all scholars agree to in principle.
2. List those evidences or sources of *Shari'ah* on which some scholars or schools of juristic thought differ upon in principle regarding their validity or credibility.

LESSON 7: PRIMARY SOURCES

1. ***Qur'an***: This is the untainted Word of God revealed to the Prophet Muhammad (ﷺ) and preserved in the original Arabic language. There is a complete unanimity among all Schools of Juristic Thought (Hanafi, Maliki, Shafi', Hanbali, Zahiri, Zaydi, Ibadi, Ja'fari, Mu'tazili, etc.) that the "*Uthmani* version" of the Qur'an is multiple-chained and authentic in its entirety. In other words, it has so many independent chains of narrators that it is humanly impossible for it to

have been a forgery. Other reports of variant readings or versions (*Shadhdhah*) are regarded as single-chained hadith with only presumptive authenticity or authority (*zanni al-thubut*).²³

Scholars who specialize in the science and interpretation (*tafsir*) of the meaning of the Qur'an are called *Mufasssirun*.

2. *Sunnah*: This refers to the tradition or practice of the Prophet Muhammad (ﷺ) as preserved mainly in the authenticated hadith narrations. These hadith narrations are the main carriers, sources or conveyors of the Sunnah. These covers the records of the Prophet's actions, sayings, tacit (silent or implied) approval of the action and sayings of others along with his methodology.

Scholars who specialize in the authentication and sciences of the hadith are called *Muhaddithun*. They usually determine the authenticity of hadith based on a number of criteria which include: the soundness of the chain of reporters or narrators (*isnad*), the reliability/integrity of the individual narrators (*adalat al-rawi*), reliability of the memories of the narrators (*dabt al-rawi*) and the contents (*matn*) of the hadith.²⁴

There is unanimity among jurists and the various Schools of Juristic Thought (*madhahib*) in the acceptance of the authority of multiple-chained (*Mutawatir*) hadith as a definitive source of the sunnah. Jurists differ, however, on the authority of authentic (*sahih*) single-chained (*Ahad*) hadith.²⁵ This will be discussed in more detail in Lesson 25.

²³ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.77-79; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 54-55.

²⁴ For further reading see: Ibn Kathir, *al-Baith al-Hathith*, al-Maktabah al-Shamilah, version 3.13, p. 1; Abd-Rahman ibn Abi Bakr al-Suyuti, *Tadrib al-Rawi*, *Maktabat al-Riyadh al-Haditha*, in *al-Maktabah al-Shamela* version 3.13, p. 63; Jamaldeen Al-Qasimi, *Qawa'id al-Tahdith*, in *al-Maktabah al-Shamelah*, p. 34; Mohammed Hashim Kamali, *A Textbook of Hadith Studies*, The Islamic Foundation, Leicester, 2005; Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA Publications, 2006; M.M. Al-Azami, *Studies in Hadith Methodology and Literature*, Indianapolis, Indiana, USA: American Trust Publications, 1977; *Studies in Early Hadith Literature*. Indianapolis, Indiana, USA: American Trust Publications, 1978; Jonathan A. C. Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World*, Oneworld, Oxford, 2009

²⁵ For a very enlightening and detailed discussion of the various views regarding the importance, authority use of authentic single-chained or solitary (hadith *ahad*) among different Schools of Jurisprudence and scholars, see Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.107-129.

According to Umar Faruk Abd-Allah, “The relation between the legal content of the *Sunna* and its textual and non-textual sources – connected and disconnected hadiths, post-prophetic reports (*athar*), and praxis (*‘amal*) – is one of the most fundamental issues in the historiography of Islamic legal origins. All the early schools acknowledged the authority of the sunna but differed widely regarding the methods they used to determine what its content was and how it should be determined.”²⁶

For Malik and Abu Hanifa in particular, knowledge of the *Sunnah* – which was arrived at through various means – was the criterion against which hadiths were judged, interpreted, accepted, or rejected – not the reverse. They judged the contents of hadith by standards independent of their semantic content (*matn*).²⁷

Traditionally therefore, there were those scholars that were regarded as “scholars of hadith” as distinct from “scholars of the Sunnah”. Yet other even greater scholars were regarded as scholars of both hadith and sunnah.²⁸

The differing categories and legal implications of the Prophet’s Sunnah (tradition) and its distinction from *Seerah* (Prophetic history or biography) will also be discussed in greater detail in Lessons 28 and 29.

²⁶ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.97. More discussion on “praxis (*‘amal*)” or the “Practise of the People of Medina” (*‘amal Ahl al-Madinah*) is done in Lesson 14.

²⁷ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.96.

²⁸ According to Ibn Mahdi, Sufyan ath-Thawri was an imam in hadith but not in sunnah; Al-Awza’i was an imam in Sunnah but not in hadith; as for Malik, however, Ibn Mahdi holds that he was an imam in both hadith and Sunnah. In this report hadith and Sunnah are clearly conceived of as two quite different things. Cited in ‘Umar Faruq Abd-Allah, *Malik’s Concept of ‘Amal in the Light of Maliki Legal Theory*, (unpublished PhD. Thesis), The University of Chicago, Illinois, 1978, p.76.

DISCUSSION QUESTIONS:

1. How do scholars regard the authenticity or authority of variant readings or versions of the Qur'an?
2. What is the difference between a *Mufasssir* and a *Muhaddith*?
3. List 4 out of the major criteria of assessing the reliability of hadith narrations by scholars of hadith.
4. What type of hadith do all scholars of the various schools of jurisprudence regard as the most authoritative and why?

LESSON 8: LET'S REVIEW!

Terminology:

Let's review the additional terms we have learned. How many can you remember? Test yourself by covering the definitions on the right hand side.

TERMS	MEANING/EXPLANATION
1. <i>Fard/Wajib</i>	Compulsory, obligatory and sinful if omitted
2. <i>Mustahab/Mandub</i>	Recommended, encouraged, and rewarding act
3. <i>Mubah/Ja'iz</i>	Permissible, neither encouraged nor discouraged
4. <i>Makruh</i>	Discouraged, disliked but tolerated
5. <i>Makruh Tanzihi</i>	Discouraged, disliked but tolerated. (Technical a Hanafi terminology)
6. <i>Makruh Tahrimi</i>	Highly discouraged, bearing a high probability (<i>zanni</i>) of sin. (Technical a Hanafi terminology)
7. <i>Halal</i>	Permissible, falling anywhere within the range of compulsory to recommended to discouraged. Not <i>haram</i> .
8. <i>Haram</i>	Forbidden, prohibited and sinful if committed. Not <i>halal</i> . Opposite of <i>fard/wajib</i> .
9. <i>Nafilah</i>	Supererogatory acts of worship
10. <i>Riba</i>	Usury/interest
11. <i>Shirk</i>	Associating partners with God, polytheism
12. <i>Al-asl fi al-ashya al-ibaha</i>	The legal premise/assumption regarding any issue is permissibility
13. <i>Qat'i al-dilalah</i>	Unambiguous, categorical and explicitly clear (<i>qat'i</i>) meaning and implication (<i>dilalah</i>) of text
14. <i>Qat'i al-wurud/Qat'i al-thubut</i>	Definitive, certain, categorical or undisputedly (<i>qat'i</i>) authentic and reliable text or narration (<i>wurud/ thubut</i>)
15. <i>Zanni al-dilalah</i>	(Text)of indefinite, speculative or presumptive (<i>zanni</i>) meaning or implication (<i>dilalah</i>)
16. <i>Ilm al-yaqeen</i>	Knowledge/truth (<i>'ilm</i>) regarding which there is absolute certainty (<i>yaqeen</i>)
17. <i>Hadith ahad/Khabr wahid</i>	Literally, lone-narrator, solitary or single-chained hadith. Hadith with less independent chains than <i>Hadith Mutawatir</i> .
18. <i>Hadith mutawatir</i>	Independent multiple-chained hadith of certain or undoubted authenticity
19. <i>Tafsir</i>	The science and interpretation of the meaning of the Qur'an

20. <i>Mufasssirun</i>	Scholars who specialize in <i>tafsir</i> commentary of the Qur'an
21. <i>Seerah</i>	Prophetic history or biography
22. <i>Muhaddithun</i>	Scholars who specialize in the authentication and sciences of hadith
23. <i>Isnad</i>	Chain of narrators (of hadith)
24. <i>Adalat al-rawi</i>	Reliability, integrity and credibility of an individual narrator
25. <i>Matn</i>	Text or contents (of a hadith narration)

DISCUSSION QUESTIONS:

Find a partner to discuss the following questions:

1. What are some of the differences between the *Hanafi* School's legal classification and that of other Schools?
2. Why do you think some scholars consider there to be a different degree of authority between a *Hadith Ahad* and a *hadith mutawatir*?
3. What is an example of an issue about which a primary source of evidence is explicitly clear?
4. What is an example of an issue about which a primary source of evidence is indefinite in meaning and more evidence is required?

LESSON 9: SECONDARY SOURCE: *IJMA'*

There are several secondary sources of evidence or tools for *Ijtihad* (juristic reasoning and deduction of rulings). One is *Ijma'*: a consensus of opinion. This consensus could mean, to various scholars, either unanimous or majority opinion.²⁹

²⁹ Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation*, OUP, Oxford, 2009, p.361; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.109-112

The majority of scholars view *ijma'* as a “rational proof” and the third source of Islamic law after the Qur'an and Sunnah when there is an absence of any textual evidence.³⁰ If *ijma'* is resorted to as a third independent authoritative source of legislation and only in the absence of clear textual evidence from the Qur'an or Sunnah, then such an *ijma'* must have been arrived at by *ijtihad*, hence its description as a “rational proof” and described by some as consensus of collective *ijtihad* (*ijtihad jama'iy*).³¹ There is safety in numbers!

Scholars, however, differ on the definition, the feasibility or way of determining and ascertaining how a “consensus” is reached, the level of certainty it gives, how it was to be used, its authority and binding nature, etc.³² It is due partly due to their concern over the feasibility of *ijma'* that according to the Zahiris and Imam Ahmad ibn Hanbal, *ijma'* refers to the consensus of the Companions alone. Imam Malik on the other hand confines *ijma'* to that of the people of Madinah.³³ According to the Shafi' jurist Imam al-Haramayn al-Juwayni, *Ijma'* is the agreement by the jurists of a generation on a case of Sacred Law, and it is binding upon the next generation.³⁴

According to some scholars, a ruling of *ijma'* may have reached us by continuous multiple testimony (*tawatur*) in which case they would regard it as definitely proven (*qat'i al-thubut*) and similar to the Maliki “*Amal* of Medina” (to be discussed in Lesson 14).³⁵ But when *ijma'* is transmitted through solitary reports, its authenticity would be open to doubt and therefore of only presumptive authority (*zanni al-thubut*).³⁶ Therefore it is not sufficient in the view of these

³⁰ Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.90

³¹ Tariq Ramadan, *To Be a European Muslim*, The Islamic Foundation, Leicester, 1999

³² Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.109-112; Mohammad Omar Farooq, *Towards Our Reformation: From Legalism to Value Oriented Islamic Law and Jurisprudence*, IIIT, London, 2011, p.141-167; Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.130.

³³ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.169

³⁴ Mahmud Adam, *Introductory Studies in Usul al-Fiqh: An Annotated Translation of Imam Al-Haramayn's Waraqaat*, The Imam Shafi'i Bookstore, London, 2014, p.28.

³⁵ The word “Madinah” is spelt differently by various authors – Medina, Madeenah, Medinah, etc.

³⁶ See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.21

scholars that there exists a claim of *ijma'* (of whatever definition and feasibility) on an issue, it is also has to be proven (as with hadith narrations) that such as claim is definitely authentic and corroborated with multiple independent claims.

Some scholars also regard as *ijma'* the consensus on issues upon which there is no known dissent concerning the meaning or implication (*dilalah*) of the text of the Qur'an or *Sunnah*.³⁷ Consequently, the determination of whether a particular text is explicitly clear (*qat'i*) or speculative (*zanni*) in its meaning and implication (*dilalah*) is determined by the existence of *ijma'* or absence of recognized dissent (*khilaf*). *Ijma'* in this sense therefore has the benefit of giving greater certainty and authority to an interpretation of the text and the rulings or verdicts (*fatwa*) arrived at. Others would argue that this so-called "*ijma'*" is merely complete agreement on the interpretation of an existing text of the Qur'an or *Sunnah*, and not an independent source of jurisprudence or law when the text is silent or ambiguous, which real *ijma'* is described as by the majority of its proponents.

Like the word *Sunnah* (as we shall see in Lessons 28 and 29), *ijma'* constitutes a loaded, or "complex term". Attention must therefore be paid to how particular jurists and their schools defined and used it. Moreover the concept of consensus in Islamic legal history must always be juxtaposed against the phenomenon of dissent, which served as the index by which jurists generally determined the contents of their general agreement. *Ijma'* could be regarded as the absence of known or recognized dissent.³⁸

The authority of *ijma'* is often derived from the following evidence:

And anyone who splits off from the Messenger after the guidance has become clear to him and follows a way other than that of the believers, We shall leave him in the path he has chosen, and land him in Hell. What an evil refuge! (Qur'an 4:115)

³⁷ Muhammad bin Ibrahim bin al-Mundhir, *Al-Ijma'*, Dar al-Muslim, 1425 AH

³⁸ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.130.

...If they would only refer it to the Messenger and those among them who hold authority, those of them who seek its meaning would have found it out from them. (Qur'an 4:83)

O you who believe, obey Allah and obey the Messenger, and those placed in authority over you". (Qur'an 4:59)

And among those We created is a community which guides by truth and thereby establishes justice (Qur'an 7:181)

Ali was reported to have said that, *"I said, O Messenger of Allah; an issue might arise (after you) which has no justification from Qur'an, and which no tradition from you has come to prove."* The prophet (ﷺ) said: *"Gather on it (i.e. the new issue) the scholars or he said the true worshippers among the believers, and mutually consult among yourselves, and do not base your judgment of it on one man's opinions".*³⁹

Other hadith include: *"My Ummah will not agree on error."*⁴⁰ *Allah's hand is with community (jama'ah)"*⁴¹; *"Those who seek the joy of residing in Paradise will follow the community of Muslims. For Satan can chase an individual, but he stands farther away from two people"*⁴²; *"The hand of God is with the community, and (its safety) is not endangered by isolated oppositions"*⁴³; *"Whoever leaves the community or separates himself from it by the length of a handspan is breaking his bond with Islam"*⁴⁴; *"Whoever separates himself from the community and dies, dies the death of (People of) Ignorance*

³⁹ Jalal al-Din al-Suyuti, *Jami'i al-Ahadith*, Hadith no. 34212. Some Hadith scholars regard this hadith as "weak" (*da'if*). See Al-Ayni, *Umdat al-Qari: Sharh Sahih al-Bukhari*, Al-Maktabah al-Shamila, version 3.13, vol. 24, p.220

⁴⁰ Al-Tirmidhi, no. 2167; Ibn Majah, no. 3950; and Abu Dawud, no. 4253 Al-bani said this hadith is *Hasan* ("good") in *Silsilat al-Ahadith al-Sahiha*, no. 1331

⁴¹ Al-Tirmidhi, no. 2166

⁴² *Al-Risalah* of Imam Shafi'i, p.471 – 476; Al-Umm, Vol. VII, p.191- 193; *Al-Mustadrak*, vol.1, p.114 - Cited in Ahmad Hassan, *Doctrine of Ijma' in Islam*, Kitab Bhavan, New Delhi, 2nd Ed., 2003, p.40.

⁴³ Cited in Ahmad Hassan, *Doctrine of Ijma' in Islam*, Kitab Bhavan, New Delhi, 2nd Ed., 2003, p.40.

⁴⁴ Abubakar Ahmad bin Husain bin Ali Al-Baihaqi, *Al-Sunan Al-Kubra*, no. 16391, Maktab Dar al-Baz, Makkah, 1414 AH; *Sunan Abu Dawud*, no. 4760. Al-bani Said it is authentic in *Sahih al-Jamiu al-Saghir*, no. 6410.

(jahiliyyah)”⁴⁵; Abdullah Bin Masud said: “Whatever the Muslims consider good is good in the eye of Allah, and whatever they consider evil is evil in the eyes of Allah”.⁴⁶

Having discussed the evidence in the *ahadith* relating to *ijma'*, Ahmad Hasan observes that they are inconclusive and do not amount to authoritative textual evidence for *Ijma'*. “All of them emphasise unity and integration. Some of them are predictive and others circumstantial: They may mean *ijma'*, or something else.’ Hence the argument that they provide the authority for *ijma'* is ‘definitely subjective’. The same author elaborates that: “There was no idea of *ijma'* as a doctrine of jurisprudence in the early period; The jurists could not determine a definite meaning for ‘*ummah*’ or *Jama'ah* ; and *Ahadith* which convey a general meaning should not be restricted to a particular point of view.”⁴⁷

According to Kamali however, notwithstanding the doubts and uncertainties in the texts (*nusus*) used to give authority to *Ijma'*, “the majority of ulema have concluded that the consensus of all the *mujtahidun* on a particular ruling is a sure indication that the word of truth has prevailed over their differences; that it is due to the strength of that truth that they have reached a consensus. This rational argument in support of *ijma'* has been further advanced to the effect that consensus upon a *shar'i* ruling is bound to be founded on sound *ijtihad*. In exercising *ijtihad*, the *mujtahid* is normally guided by certain rules and guidelines. *Ijtihad* often consists of an interpretation of the text (*nass*), or of a rational extension of its ruling. Even in the absence of a *nass*, *ijtihad* still observes both the letter and spirit of the sources which the *mujtahid* has mastered through his general knowledge. Since *ijtihad* is founded on sound authority in the first place, the unanimous agreement of all the *mujtahidun* on a particular ruling indicates that there

⁴⁵ *Sunan* Abu Dawud, no. 4760; *Sunan* al-Tirmidhi, no. 2863; *Musnad* Imam Ahmad, no. 21460; Abu Abdullah Al-Hakim, *Al-Mustsdrak*, no. 259, 408; Abu Nua'im Ahmad bin Abdullahi Al-Asbahani, *Hilyat al-Awliya*, Dar al-Kitab al-Arabi, Beirut vol. 9, p.58; Abubakar Ahmad bin Husain Al-Baihaqi, *Shu'ab al-Iman*, Dar al-Kutub al-Ilmiyyah, Beirut, 1410 AH, no. 7495 and in *Al-Sunan Al-Kubra*, no. 16391, Maktaba Dar al-Baz, Makkah, 1414 AH; Abu al-Qasim Sulaiman bin Ahmad Al-Maharani, *Al-Ma'am al-Awsat*, Dar al-Haramayn, Cairo, 1415 AH, no. 3405; Al-Albani authenticated the hadith in *Tahrim Alatal-Tarb*, p.135, and in *Silsilatu al-Ahadith al-Sahihah*, no. 984.

⁴⁶ See comments of various traditionists (Muhaddithun) on this saying in the annotations of Al-Shaybani's *Al-Muwatta* by Abd al-Hayy, p.112 Abu Abdullah Al-Hakim, *Al-Mustsdrak*, no. 4465. Dar al-Kutub al-Ilmiyyah, Beirut, no.1411 AH; Abu al-Qasim Sulaiman bin Ahmad Al-Tabarani, *Al-Mu'jam al-Awsat*, Dar al-Haramayn, Cairo, 1415 AH, no. 3602; *Musnad* Imam Ahmad, no. 3600; Abdurahman Al-Sakhawi, *Al-Maqasid al-Hasana*, no. 959.

⁴⁷ Ahmad Hasan, *The Doctrine of Ijma*, p.59-60, cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.168

is clear authority in the *Shari'ah* to sustain their consensus. In the event of this authority being weak or speculative, we can only expect disagreement (*ikhtilaf*), which would automatically preclude consensus. *Ijma'* in other words, accounts for its own authority.”⁴⁸

Consequently, while there is a general consensus in principle on the validity and authority of *Ijma'*, it is when it is to be demonstrated in practise on a specific case that differences of definitions and perspectives on *Ijma'* begin to become clearer.

Examples of issues on which some have claimed there is an *ijma'* include the opinion that intentional laughter during *Salat* invalidates the *Salat*;⁴⁹ that intentionally missed prayers must be made up; that a woman's leadership is prohibited; the punishment for leaving Islam (apostasy) is fixed (*hadd*) capital punishment; that the pronouncement of *talaq* (divorce) three times at one sitting is valid as terminal; and that slaughtering an animal without mentioning Allah's name is unlawful.⁵⁰

It should be noted that, despite the claims by some that an *ijma'* exists on these issues, a number of classical jurists have in fact differed on these topics. The claimed *Ijma'* on these might therefore simply have meant “consensus due to unknown or unrecognized dissent”.

DISCUSSION QUESTIONS:

1. What is meant by *Ijma'* and why is it regarded as a useful secondary source of *Shari'ah*?
2. What type of *ijma'* do scholars disagree on, if any?
3. Give at least 3 examples of textual evidence used in justifying the authority of *ijma'*.
4. Why do you think some scholars (such as IbnTaimiyyah) would regard *ijma'* as a form of *ijtihad*, or consensus of collective *ijtihad* (*al-ijtihad al-jama'i*)
5. Give examples of issues on which there is genuine consensus (*ijma'*) among all scholars and give reasons why such a consensus would be regarded as an example of *ijma'*.

⁴⁸ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.168.

⁴⁹ Muhammad ibn Ibrahim ibn al-Mundhir, *Al-Ijma'*, Dar al-Muslim, 1425 AH, p.38

⁵⁰ Mohammad Omar Farooq, *Towards Our Reformation: From Legalism to Value Oriented Islamic Law and Jurisprudence*, IIIT, London, 2011, p.144-147.

LESSON 10: SECONDARY SOURCE: QIYAS

Another secondary source of evidence or tool is *Qiyas*: analogical reasoning or deduction. This is the practice of basing a new legal ruling on a previous ruling concerning a similar case, given the similarity between the two cases with respect to their underlying basis or occasion. The tool of *qiyas* identifies a reason (*'illah*) evident in the text, or underlying wisdom (*hikma*) in a previous

ruling and then applies it to a related issue.⁵¹ *Qiyas* also refers to the “application of general rules to particular cases.”⁵² Since each particular case is new, the crucial question is whether the unassimilated particular case actually falls under the relevant general rule or whether there is some reason to limit its application in the specific new case.⁵³

Analogy (*qiyas*) is the only form of reason-based legal argumentation (or rational method of *ijtihad*) accepted by all major Sunni schools that could boast of anything approaching consensus.⁵⁴ Each of the 4 major Sunni jurists – Abu Hanifah, Malik, Shafi’i, and Ibn Hanbal – issued legal rulings based on it. Analogy however did not enjoy total consensus as the jurists differed in their methods of applying it, and the restrictions they were willing to use to curtail its strict application.⁵⁵

Scholars differ with regard to the types, condition and the binding nature of *qiyas*.⁵⁶ They generally do not approve of *qiyas* being applied to issues related to creed (*aqidah*) and prescribed devotional acts or rituals (*ibadah*),⁵⁷ and they do not regard one who rejects *qiyas* as a disbeliever. They sometimes differ on what the effective cause (*‘illah*) or underlying wisdom (*hikma*) is, and its use when applying *qiyas*.⁵⁸

⁵¹ Gamal Eldin Attia, *Towards Realization of the Higher Intents of Islamic Law: Maqasid al-Shari’ah, A Functional Approach*, IIIT, London, 2007, p.291; Omar Farooq, *Towards Our Reformation: From Legalism to Value Oriented Islamic Law and Jurisprudence*, London, 2011, p.168-220.

⁵² In other schools (such as the Ja’fari or Imami of the Shi’ah sect) the principle of “transference of ruling” (*ta’diyat al-hukum*) is invoked.

⁵³ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.154.

⁵⁴ There is much greater divergence of opinions on the other “rational tools” or reason-based sources of Shari’ah such as *istihsan*, *sadd al-dhara’i* and *masalih al-mursalah*, as we shall see later on in this material.

⁵⁵ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.145-146.

⁵⁶ Mohammad Hashim Kamali, *Methodological Issue in Islamic Jurisprudence*, Arab Law Quarterly, vol.11, no.1, (1996), Brill Academic Publishers, P.25-28, available on <http://www.jstor.org/>

⁵⁷ Mohammad Hashim Kamali, *Principle of Islamic Jurisprudence*, p.191; Abdul Wahab Khallaf, *Masadir al-Tashri’ al-Islamiyy fi ma la Nass fihi*, Kuwait, Dar al-Qalam, 1414 AH, 6th ed., p.26 and 30; Ibn Kathir, *Tafsir Ibn Kathir*, Dar Tayba, Madinah, 1420 AH, vol.7, p.465; Al-Hasan bin Ali al-Barbahari, *Sharh al-Sunnah*, Makrabah al-Sunnah, Egypt, 1416 AH, p.28, 47 & 49.

⁵⁸ Mohammad Hashim Kamali, *Principle of Islamic Jurisprudence*, p.274-279; Mohammad Hashim Kamali, *Methodological Issues in Islamic Jurisprudence*, Arab Law Quarterly, vol.11, no.1, (1996), Brill Academic

An area of concern for scholars is the fact that the use of analogy (*qiyas*) – and the identification of the *illah* or *hikmah* – often implied some degree of conjecture in the implication (*zanni dilalah*). Its use on the basis of solitary hadith (*ahad*) or any other source of *Shari'ah* that was already speculative or presumptive in authenticity or credibility (*zanni al-thubut*), only increased the degree of conjecture (*zanni*) involved in arriving at a legal ruling or verdict. Various conditions and restrictions were therefore attached to the use of analogy (*qiyas*) so as to reduce the level of speculation or uncertainty involved.⁵⁹

Scholars often rely on the following verse and authentic traditions for the authority of *qiyas*:

It is Allah who has sent down the Book (the Qur'an) in truth, and the balance (i.e. to act justly). And what can make you know that perhaps the Hour is close at hand?"
(Qur'an 42:17).

Ibn Uthaymeen comments on the above verse, that the "balance" (*mizan*) is what is used for measurement and comparison. He further said it implies the validity of analogical deduction (*qiyas*).⁶⁰

Ibn Abbas (may Allah be pleased with him) reported: "A woman came to the Messenger of Allah (may peace be upon him) and said, 'My mother has died, and a month's fasting is due from her.' Thereupon he said, 'Don't you see that if a debt was due from her, you would have to pay it?' She said, 'Yes (I would pay it on her behalf).' Thereupon he said, 'The debt of Allah deserves its payment even more (than the payment of anyone else).'"⁶¹

Publishers, p.25-28, available on <http://www.jstor.org/>; Omar Farooq, *Towards Our Reformation: From Legalism to Value Oriented Islamic Law and Jurisprudence*, London, 2011, p.168-220.

⁵⁹ A discussion of the different approaches used by jurists and their schools in the application of various forms of analogy is beyond the scope of this work. Interested readers could refer to some of the main references used in this material for further reading. See also, Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.145-157.

⁶⁰ Ibn Uthaymeen, *Al-Usul min Ilm al-Usul*, Riyadh, (no date), p.68

⁶¹ Sahih Muslim, no. 2553

Abu Hurairah (may Allah be pleased with him) narrated: “A man said, ‘O Allah’s Messenger, my wife has given birth to a black son.’ The Prophet said, ‘Have you any camels?’ He replied, ‘Yes!’ He asked what their colour was. The man replied, ‘They are red.’ He asked, ‘Is there a grey one among them?’ He replied, ‘Yes,’ then asked, ‘Is it perhaps a strain which it has inherited?’ The Prophet then said (to the man), ‘It is perhaps a strain to which this son of yours has inherited.’⁶²

In the first hadith, the Prophet (ﷺ) makes an analogy between the legality of paying off the financial debt of a loved one and the legality of paying of a fasting debt. In the second hadith, the Prophet (ﷺ) makes an analogy between the birth of a camel bearing a different colour to its mother and the birth of a human child bearing a different colour to the child’s parents. Just as the different skin colour of animal offspring is considered normal genetic variation, so is the different skin colour of human offspring not to be considered evidence of foul play.

Examples of laws established on the application of *qiyas* are the prohibition of narcotics based on the analogy with intoxicating alcohol; or that dog saliva is impure and spoils prayer based on the fact that a hadith requires that a bowl from which a dog drinks should be washed 7 times; and that a killer will not inherit from a will (*wasiyyah*) even though the hadith only says s/he cannot automatically inherit (*mirath*) where there is no will.⁶³

In order to draw a clearer line between the Sunnah and *Qiyas*, and so that it does not impinge or encroach upon the Sunnah, even when it appeared clear enough that its use was legitimate and even “a good Sunnah”, scholars such as Ibn Hanbal declared that “There is no *qiyas* in the *Sunnah*, and examples are not to be made up for it” (*wa laysa fi al-sunnah qiyas, wa la yudrab laha al-amthal*).⁶⁴

⁶² “Agreed upon”. Cited in Ibn Qayyim al-Jawziyyah, *Ilam al-Muwaq’i’nan Rabb al-Alamin*, Beirut, Dar al-Fikr, 1374, vol. 1, p.182. Many other prophetic traditions are mentioned by Ibn Qayyim arguing in favour of endorsing *qiyas*.

⁶³ Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.101-102

⁶⁴ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.157.

Ahmad Ibn Hanbal had recourse to the most extensive number of texts of any Sunni Imam, and only resorted to analogy when he had exhausted his textual references and failed to find a relevant precedent in any of them.⁶⁵

The Zahiri School did not accept analogical reasoning or *qiyas* as one of the valid secondary sources of *Shari'ah*.

DISCUSSION QUESTIONS:

1. What is meant by *Qiyas* and explain why it is a useful tool or source in *Shari'ah*?
2. Give at least 2 textual evidences used to justify the authority of *Qiyas* in *Shari'ah*.
3. List the minimum components of *Qiyas*.
4. Why are some scholars apprehensive of, or reluctant to use *qiyas*?
5. Give examples of rulings (or features) arrived at through *qiyas*.

LESSON 11: SECONDARY SOURCE: *RA'I AL-SAHABI*

⁶⁵ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.146.

Ra'i al-Sahabi is the reasoning or Opinion of a Companion of the Prophet (ﷺ). This is often discerned from a recorded saying or *fatwa* of a Companion (*sahabi*) which has not been contradicted by any other Companion's opinion.⁶⁶

Some scholars use the following verses to support the authority of *Ra'i al-Sahabi*:

"O you who believe, obey Allah and obey the Messenger and those in authority among you". (Quran 4:59)

"And the foremost of those who forsook their homes and emigrated with the Messenger, those who welcomed them and gave them aid and those who followed their example, are the recipients of Allah's blessings. Allah has been gracious to them. He is well pleased with them and they with Him." (Quran 9:100)

The Prophet (ﷺ) said, *"You must follow my sunnah and that of my rightly-guided successors. Hold to it and stick fast to it. Avoid innovation, for every innovation is a heresy, and every heresy is an error".*⁶⁷

*"My companions are like stars. You will be guided by any one of them you follow"*⁶⁸

*"The best generation is my generation, then those who follow them, and then those who follow them."*⁶⁹

Examples of rulings based on the Opinion of a Companion include the *fatwa* of 'Umar bin al-Khattab on the finality of triple-divorce at one instance. During his caliphate (rule), 'Umar judged

⁶⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.313-322; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.128-129.

⁶⁷ *Al-Mustadrak*, no.329; *Al-Baihaqi, al-Sunan al-Kubrah*, no. 20835; *Ibn Majah, Sunan Ibn Majah*, no. 42; *Musnad Imam Ahmad* no.17145; *Sunan al-Tirmidhi*, no.2676; *Sunan Ibn Majah*, no. 42; *Sunan al-Darimi*, no. 95.

⁶⁸ Abdulrahman Al-Sulami, *Adab al-Suhbah*, Dar al-Suhbah, no.192; Other Hadith Scholars such as Ibn Hazm, Ibn Hajar, Ibn Mulaqqan, and Al-Albani consider this hadith to be fabricated (*mawdu'*). For more discussions, see 'Umar bin Ali bin Mulaqqan, *Al-Badr Al-Munir*, Dar al-Hijrah, Riyadh, 1425 AH, vol. 9, p.584; Muhammad Nasirudeen al-Albani, *Silsilat al-Ahadith al-da'ifah*, Riyadh, 1992, vol. 1, p.144, no. 58; Ahmad bin Ali bn Muhammad Ibn Hajar, *Al-Talkhis al-Habir*, Dar al-Kutub al-'Ilmiyyah, 1419 AH, no. 2098; Ali bin Ahmad bin Hazm, *Al-Ihkam fi Usul al-Ahkam*, Dar al-Hadith, Cairo, 1404 AH, vol.5, p.61.

⁶⁹ *Sahih al-Bukhari*, no. 2652; *Sahih Muslim*, no. 6635; *Sunan al-Baihaqi Al-Kubra*, no. 20174; *Al-Mustadrak*, no. 4871; *Sunan al-Tirmidhi*, no. 2221.

that any man who divorced his wife by pronouncing divorce three times on one occasion has divorced her irrevocably. This was a departure from what was known during the time of the Prophet (ﷺ) and Abu Bakr, who preceded him. It is widely understood that he instituted this policy in order to stop men from using utterances of divorce as a means of verbal abuse.⁷⁰

While most scholars regard the opinion of a Companion as a binding source of jurisprudence (or law), others such as **Imam Ahmad bin Hanbal** (in one of his reported views), the Ash'arites, **Abu Hamid Al-Ghazali**, **Ibn Taimiyyah**, **Ibn Hazm** and the Zahiri School, **Al-Subki**, the Hanafi scholar **Abu al-Hassan al-Karkhi**, and **Al-Shawkani** do not.⁷¹ Ibn Hazm, in fact, prohibited the "imitation of anyone other than the Prophet (ﷺ) including the Companions."⁷²

DISCUSSION QUESTIONS:

1. Explain what is meant by *Ra'i al-Sahabi* and give at least one example
2. Give at least 3 examples of textual evidence used to justify the authority of *Ra'i al-Sahabi*.
3. List some of the classical scholars who did not regard the opinion of a Companion (*sahabi*) as a binding source of law (*Shari'ah*).

LESSON 12: SECONDARY SOURCE: 'URF AND AADAT

⁷⁰ Muslim, *Sahih Muslim*, vol.2, p.759; Ahmad, *al-Musnad*, vol.4, p.314; For a more detailed discussion on the reason for Ibn Taimiyyah's objections to the position that an intended triple divorce is terminal, see Abdul Hakim I. Al-Matroudi, *The Hanbali School of Law and Ibn Taymiyyah: Conflict or Conciliation*, Routledge, New York, 2006, p.171–185.

⁷¹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.315-322; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.128-129

⁷² See Ibn Hazm, *Al-Ihkam*, p. 539, cited in Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.129.

‘Urf and Aadat are cultural norms and customs. This refers to “what is established and practiced by people from their sayings and doings, and not doings.” (Sic.)⁷³ Regional custom and convention (*al-‘urf* and *al-adah*) constitute a valid legal reference and source of law in all Sunni Schools. They however play an especially significant role in Maliki and Hanafi traditions.⁷⁴

In fact, one of the earliest theories and principles of Islam was that the religion should interfere as little as possible with pre-existing practice. That such practice could and should be followed except where the divine law forbade it or superseded it.

The prominence given to regional or local custom (as a source of Islamic law) reflects the attentions to the general good (*maslahah*), since sound custom, as a rule, have strong links with the aspirations, identity, needs, and necessities of people in the regions where they live.⁷⁵

According to Imam Al-Shatibi, this approach to local or regional custom is based on Prophetic precedent, because much of the Prophet’s legislation was an affirmation of the sound or good customary practices of pre-Islamic Arabia. The Arabs, like human societies in general, developed many good customs before the advent of Prophetic guidance. Such customs were especially well-suited to their environment and circumstances. The Prophet (ﷺ) affirmed and perfected them, only abolishing those pre-Islamic customs that were unsound or detrimental. For this reason, according to Al-Shatibi, the Prophet (ﷺ) is reported in numerous hadith to have said that the purpose of his mission was to perfect the good moral qualities (*makarim al-akhlaq*) of the people, and not to obliterate them. Once the Prophet (ﷺ) endorsed pre-Islamic customary

⁷³ Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.116.

⁷⁴ See Qarafi, *al-Dhakhirah* (Cairo), 1:143, 87-88 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.137. For more on ‘Urf and ‘Adah, see Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.137-141.

⁷⁵ Abu Zahra, Malik, 420-421 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.137.

conventions, they became technically part of his Sunnah and were incorporated into Medinese praxis (*'amal*).⁷⁶

Some scholars use the following textual authorities to support the fact that *'urf* is one of the secondary sources of *Shari'ah* in the exercise of *ijtihad* and giving *fatwas*:

"And you must live with them in recognized/accepted kindness (bil-ma'rufi)..." (Qur'an 4:19)

The Prophet (ﷺ) said, *"...You are more knowledgeable (than me) with regard to your worldly affairs (umurdunya)...."*⁷⁷

In a hadith reported by 'Aisha, in which Hind, the wife of Abu Sufyan, complained to the Prophet (ﷺ) that her husband was miserly and did not give adequate maintenance for her and her children, the Prophet (ﷺ) said, *"Take from his property what may suffice you and your children, according to custom (bi al-ma'ruf)"*.⁷⁸

Some commentators of the *Sunnah* suggested that this last hadith indicates the important role of custom, and that it should be relied upon in matters where the primary sources of *Shari'ah* do not give exact details.⁷⁹

Moreover, many financial instruments and forms of business dealings such as *Al-araya*, *Salam*, *Isitisna*, *Musharaka*, and *Murabaha*, were part of pre-Islamic custom (*'urf*) that were acceptable to Islam. The concepts of *Jizyah* (poll tax or military "exemption tax" on non-Muslims)⁸⁰ and *dhimmah* (non-Muslim protected status) were also originally pre-Islamic and yet accepted though modified by Islam. The names of most of the days of the week, and those of the months of the *Hijrilunar* calendar were also part of pre-Islamic *'urf*. These examples lend strong support

⁷⁶ Al-Shatibi, *Al-Muwafaqat*, 2:213; Abu Zahra, *Malik*, 374-375 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.137-138.

⁷⁷ *Sahih Muslim*, no. 6277.

⁷⁸ *Sahih al-Bukhari*, (2097); *Sahih Muslim*, (4575); *Musnad Ahmad bn Hanbal*, 24117

⁷⁹ Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.152 citing other authorities.

⁸⁰ Dr. Monqiz As-Saqqar, *Jizya in Islam*, Translated by Hayam Elisawy, Source: http://www.irfi.org/articles/articles_1051_1100/Jizya_in_islam.htm (visited on 4/12/2013).

that customs that have no contradiction with *Shari'ah* ethics are acceptable bases to derive rulings from.

Additional examples of accepted '*urf*' include various monetary exchanges or currencies; language and idiomatic expressions; the law of *qisas* (equitable retribution); public holidays; traditional names; customary rules regarding payment of the dower (*mahr*) in marriage; traditional titles and administrative systems; etc.⁸¹

In terms of the use of '*urf*' in legislation among the various Schools of Juristic Thought, "the Hanafi and Maliki Schools gave culture ('*urf*') greatest reign. In the Maliki School, the authority of cultural norms may be invoked to specify or restrict the application of contrary, general legal precepts on grounds of judicial preference (*istihsan*)".⁸² The Zahiri School however rejects '*urf*' as a source of legislation.⁸³

DISCUSSION QUESTIONS:

1. Explain the meaning of *Urf* and '*Aadah*'.
2. What textual evidences are often used to justify the validity of *Urf* and '*aadah*' as sources of *Shari'ah*.
3. Give examples of where *Urf* and '*aadah*' have been the basis for legislations by scholars.
4. Why have some scholars (such as the Maliki and Hanafi) given significant importance to *Urf* and '*aadah*'?
5. Discuss reasons for some of the differences among scholars on the validity of *Urf* as a source of legislation.
6. Mention a school that rejects *Urf* and '*Aadah*' as source of *Shari'ah*.

⁸¹ Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.116-123; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.369-383; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.130-131.

⁸² 'Umar Faruq Abd-Allah, *Islam and the Cultural Imperative*, A Nawawi Foundation Paper, 2004, note 10, p.13

⁸³ Ibn Hazm, *Al-Ihkam fi Usul al-Ahkam*, Dar al-Hadith, Cairo, 1404 AH, vol.7, p.398.

LESSON 13: SECONDARY SOURCE: *ISTISHAB*

Istishab is the presumption of continuity of what was previously prescribed.⁸⁴ It is a judgment or ruling to the effect that a state of affairs which existed at an earlier time continues to exist now in the absence of evidence to the contrary.⁸⁵ *Istishab* essentially implies that the *status quo* becomes a source of law in the absence of better reasons to the contrary.

The textual authority for *istishab* includes:

“It is He who created for you all of that which is on the earth...” (Qur’an 2:29); and, *“And He has subjected to you whatever is in the heavens and whatever is on the earth - all from Him...”* (Qur’an 45:13) These verses and a number of others have been understood to establish the premise of permissibility of all things created “for” human use. The status quo of permissibility remains, in the absence of anything to the contrary.

An example of *istishab* which is also regarded as proof for its validity comes from the Prophet’s teaching of what to do when a person with ablution is in doubt of having spoilt his ablution by passing wind. The Prophet (ﷺ) taught that such person’s ablution was intact unless the flatulence was certain from the perception of its sound or smell.⁸⁶

Istishab is also proven by the fact that the Prophet (ﷺ) asked those who were in doubt of the number of *raka’at* they had done in *salat* to assume the minimum number which they were certain about, and compensate by adding what was then missing.⁸⁷

⁸⁴ Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation*, OUP, Oxford, 2009, p.361.

⁸⁵ Gamal Eldin Attia, *Towards Realization of the Higher Intents of Islamic Law: Maqasid al-Shari’ah, A Functional Approach*, IIIT, London, 2007, p.288.

⁸⁶ *Sahih al-Bukhari*, no.137; *Sahih Muslim*, no.98-99.

⁸⁷ *Sunan Abu Dawud*, no.1026; *Ahmad*, no.11689; *Sunan Al-Nasai’*, no.1238; *Ibn Majah*, no.1210.

Those who consider *istishab* as a valid source of law support this positive view of what already exists with rational arguments that human beings have an inborn instinct that the *status quo* remains until the contrary is proven.⁸⁸

“And they say, ‘None will enter Paradise except one who is a Jew or a Christian.’ That is (merely) their wishful thinking. Say, ‘Produce your proof, if you should be truthful.’”
(Qur’an 2:111)

The relevance of this verse to the validity of *istishab* lies within the last sentence where Jews and Christians are asked to support their claim with a proof before it may be accepted, since whatever differs from the *status quo ante* (previously existing) and existing rulings must be proven.⁸⁹

These proofs and explanations have been the sources of some legal maxims such as: “The premise in all things is that of permissibility” (*al-asl fi al-ashyah al-ibahah*); “Certainty is not overruled by doubt” (*al-yaqin la yazulu bi al-shakk*); “The norm is that the *status quo* remains as it was before” (*al-aslbaqahmakana ‘alamakana*).⁹⁰

Example of principles based on *istishab* include the presumption of an action being permissible until proven prohibited; of innocence until proven guilty; of freedom from responsibility until proven otherwise; of duty until proven fulfilled; of purity until proven impure, etc.⁹¹

Imam Malik, Imam Ahmad bin Hanbal, most followers of the Shafi’i School and those of the Zahiri consider *istishab* to be a valid independent source of *Shari’ah*.⁹² **Abu Hanifah** and the majority of his followers did not consider it an independent source, asserting that just as there

⁸⁸Abdulkareem bin ‘Ali bin Muhammad al-Namlah, *Al-Jami’ li Masa’il Usul al-Fiqh WaTatbiqiha ‘ala al-Madhab al-Rajih*, Maktabah al-Rushd, Riyadh, 1420, p.376; Abdul Wahab Khallaf, *Masadir al-Tashri’ al-Islami Fi ma laa Nass Fihi*, Dar al-Qalam, Kuwait, 1414, 6th edition, p.152-153; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.386.

⁸⁹Abdulkareem bin ‘Ali bin Muhammad al-Namlah, *Al-Jami’ li Masa’il Usul al-Fiqh WaTatbiqiha ‘ala al-Madhab al-Rajih*, Maktabah al-Rushd, Riyadh, 1420, p.377.

⁹⁰ Abdul Wahab Khallaf, *Masadir al-Tashri’ al-Islami Fi ma laa Nass Fihi*, Dar al-Qalam, Kuwait, 1414, 6th edition, p.152-153.

⁹¹Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.132.

⁹² Al-Shawkani, *Irshad al-FahulllaTahqiq al-Haq min ‘Ilm al-Usul*, Edited by Ahmad ‘Azw ‘Inayah, Dar al-Kutub al-‘Arabiyyah, Beirut, 1419, vol.2, p.174; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.259.

should be a textual proof for an issue in the past to be binding, there must be a textual proof for its continuity as well.⁹³

DISCUSSION QUESTIONS:

1. Explain what is meant by *Istishab*
2. Give examples of textual evidences used to justify *Istishab*
3. Give examples of rulings or principles based on *Istishab*
4. Discuss some of the differing views of scholars on *Istishab*

⁹³ Abdul Wahab Khallaf, *Masadir al-Tashri' al-Islami Fima la Nass Fihi*, Dar al-Qalam, Kuwait 1414, 6th edition, p.152. Other sources consulted however, differed on the position of Malik and Hanafi regarding the validity of *Istishab* as an independent tool. See for example: Al-Shawkani, *Irshad al-Fuhullat al-Haq min 'Ilm al-Usul*, Edited by: Ahmad 'Azw 'Inayah, Dar al-Kutub al-'Arabi, Beirut, 1419, vol.2, p.174; M. H. Kamali, *Principles of Islamic Jurisprudence*, 2001, p.25; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p. 132; and Abdul Wahab Khallaf, *Masadir al-Tashri' al-Islami Fima la Nass Fihi*, Dar al-Qalam, Kuwait 1414, 6th edition, p.152.

LESSON 14: SECONDARY SOURCE: AMAL AHL AL-MADINAH

Amal Ahl al-Madinah refers to the tradition and praxis (*'amal*) or consensus (*ijma'*) of the People of Madinah at the time of Imam Malik bin Anas (d.179 AH) and before. These practices are those that were common and known among the people of Madinah, which they had inherited from their ancestors going back to the period of the Prophet (ﷺ).⁹⁴

For Malik, the Medinan praxis (*'Amal ahl al-Madinah*) embodied the soundest and most normative application of the Qur'an and all legal texts. It constituted the living embodiment of the well-established Sunnah, and its authority rested on the fact that the greater body of jurists of Medina recognized its validity.⁹⁵ **Imam Malik** therefore considered the standard practice of the people of Madinah to be more representative of the conduct of the Prophet (ﷺ), and therefore the *Sunnah*, than the isolated hadith reports of one or two individuals. In his opinion, this practice represents the narration of thousands upon thousands of people who could trace their understanding ultimately to the Prophet (ﷺ). It is, in other words, equivalent to a 'famous' (*Mashhur*), or even multiple-chained (*Mutawatir*) narration.⁹⁶

The *Amal Ahl al-Madinah* is accepted by only the Maliki School of Juristic Thought (*madhhab*) as a basis of law, though it has the support of some individual scholars of other Schools. Some of

⁹⁴ Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.124-126; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.129-130. For a comprehensive and scholarly understanding of the '*Amal of Ahl al-Madinah*' see 'Umar Faruq Abd-Allah, *Malik's Concept of 'Amal in the Light of Maliki Legal Theory*, (unpublished PhD. Thesis), The University of Chicago, Illinois, 1978; Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madianan 'Amal*, Routledge, 1999; Dutton, *Original Islam: Malik and the Madhhab of Madina*, Routledge, New York, 2007; and Ibn Taimiyyah, *The Madinan Way: The Soundness of the Basic Premises of the School of the People of Madina*, Bookwork, Norwich, 2000.

⁹⁵ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.122.

⁹⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.103

the Hanbali scholars such as Ibn Taimiyyah and Ibn Qayyim also, in principle, recognize the legitimacy of *Amal Ahl al-Medina*.⁹⁷

According to Muhammad Hashim Kamali, “Imam Malik has gone as far as to equate the *amal ahl al-Madinah*, that is the customary practice of the people of Madinah, with *ijma*’. This type of ‘*amal* (lit. ‘practice’) constitutes a source of law in the absence of an explicit ruling in the Qur’an and *Sunnah*.”⁹⁸

The authority for *Amal of Ahl al-Madinah* mainly derives from the following evidence:

Qadi ‘Iyad mentions in his *Masalik*: “It is related that ‘Umar ibn al-Khattab, may Allah be pleased with him, once said on the *mimbar*, ‘By Allah, I will make things difficult for anyone who relates a hadith which is contrary to the ‘*amal of Madinah*’.”⁹⁹

Ibn Taimiyyah noted in his treatise on the *Amal of Ahl al-Madinah* that, “During the time of the three excellent generations, there was no evident innovation in Madinah at all and no innovation issued from it at all regarding the basic premises of the *deen*, such as emerged from all the other cities.”¹⁰⁰

It may also be concluded that the Malikis give more authority to the *amal* of Madinah since up to 10,000 Companions of the Prophet (ﷺ) died in Madinah, and “the seven great *Fuqaha* (jurists)” were based there as well. The first 3 Caliphs had their headquarters in Madinah¹⁰¹ from where learned Companions were sent to other places. Madinah was a sanctuary of Islamic studies during the time of the Companions, and therefore became a strong source of *Shari’ah* for Imam Malik, consolidating his view towards the city’s *amal*.¹⁰²

⁹⁷ Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p. 124-126. See Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.129, and Ibn Taimiyyah, *The Madinan Way: The Soundness of the Basic Premises of the School of the People of Madina*, Bookwork, Norwich, 2000.

⁹⁸ *Ibid.*, p.372.

⁹⁹ Cited in Yasin Dutton, *Original Islam: Malik and the Madhhab of Madina*, Routledge, London, 2007, p.69.

¹⁰⁰ Ibn Taymiyyah, *The Madinan Way: The Soundness of the Basic Premises of the School of the People of Madina*, BookWork, 2000, p.8.

¹⁰¹ Ali, the 4th Caliph, established his headquarters in Kufa.

¹⁰² Ibn Taymiyyah, *The Madinan Way: The Soundness of the Basic Premises of the People of Madina*, Bookwork, 2000, p.10-24.

For Imam Malik, and the early Maliki scholars, “a solitary hadith which is not supported by Medinese praxis (*‘Amal*) will simply be discarded. Nevertheless, when solitary hadiths agree with Medinese praxis, they constitute one of the most authoritative types of Medinese praxis and belong to the category later jurists termed “transmissional praxis” (*al-‘amal al-naqli*).”¹⁰³

“Imam Malik would rely on a solitary hadith on condition that it does not disagree with the practice of the Madinese (*ahl al-Madinah*).”¹⁰⁴ **Ibn al-Qasim** and **Ibn al-Wahab** said, “We saw that, for Malik, *amal* was stronger than hadith.”¹⁰⁵

Others like **Imam Shafi’i**, however, differed with his teacher, Imam Malik, on giving precedence to *amal* over *hadith ahad*.¹⁰⁶ The Hanafi also disagree with the Malikis on the concept of the practice of the people of Madinah¹⁰⁷ and scholars like **Ibn Hazm** of the Zahiri School argued against it.¹⁰⁸

While Medinan praxis (*‘Amal*) did contribute most significantly towards “maximizing certainty” in the assessment of authority and implications of legal proofs (*adillah*), there is no indication however, that Malik (or the Malikis) believed it to be conclusively authoritative, infallible, or universally binding.¹⁰⁹

Also, while there are instances where positions generally agreed upon in Medina (*‘Amal*) met with overwhelming dissent in other regions, it is difficult to see how consensus or broad agreement could be reached on any matter on which there was disagreement within Medina. In fact, the respected Hadith scholar and jurist, Sa’id Ibn Abi Maryam (d.224AH/838) contended that consensus was never reached outside Medina on an issue pertaining to the *Sunnah* that

¹⁰³ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.126.

¹⁰⁴ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.103.

¹⁰⁵ Yasin Dutton, *Original Islam: Malik and the Madhhab of Madina*, Routledge, London, 2007, p.69.

¹⁰⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.63.

¹⁰⁷ ‘Umar Faruq ‘Abd-Allah, *Malik’s Concept of ‘Amal in the Light of Maliki Legal Theory*, (unpublished PhD. Thesis), The University of Chicago, Illinois, p.337-341

¹⁰⁸ Ibn Hazm, *Al-Ihkam fi Usul al-Ahkam*, Dar al-Hadith, Cairo, 1404 AH, vol.4, p.597

¹⁰⁹ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.133.

was contrary to the teachings of Malik in *Al-Muwatta'*. In other words, if there was no consensus in Medina, it was difficult to find it elsewhere.¹¹⁰

Examples of Maliki positions that are based on the *Amal Ahl al-Madinah* include some of the weights and measures (*sa'* and *mudd*) used in Madinah for the collection of *zakat*; the wording of the *adhan* and *iqamah* for congregational prayers; the omission of the recitation of *basmalah* during congregational prayers; the absence of *zakat* on green vegetables; and praying (*salat*) with hands down one's sides (*sadl*).¹¹¹

DISCUSSION QUESTIONS:

1. Explain the meaning of *Amal ahl-al-Madinah*
2. Give evidences used to justify the validity of *Amal ahl-al-Madinah*
3. Why do you think the Maliki School regards the *Amal* of Madinah as a better representation of the normative Sunnah of the Prophet and that of the majority of his most respected Companions, than a solitary or single-claimed (*ahad*) hadith?
4. List some examples of rulings reached by use of *Amal ahl-al-Madinah*
5. Discuss some of the reasons for differing opinions regarding the validity of *Amal ahl-al-Madinah*.

¹¹⁰ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.133.

¹¹¹ Abdul Rahman ibn al-Qasim, cited in Sahnun ibn Sa'id, *Al-Mudawwana al-Kubra*, vol. 1, p.149, *Al-Maktabah al-Shamilah*, Version 3.13; Ibn Rushd, *Bid'ayat al-Mujtahid, The Distinguished Jurist's Primer*, (translated by Imran Ahsan Khan Nyazee), Garnet Publishing Limited, Reading, U.K., 1994; Vol. I, p.151; see more examples of *amal* in 'Umar Faruq Abd-Allah, *Malik's Concept of 'Amal in the Light of Maliki Legal Theory*, (unpublished PhD. Thesis), The University of Chicago, Illinois, 1978; p.549-756.

LESSON 15: SECONDARY SOURCE: *SHAR'U MAN QABLANA*

Shar'u man Qablana refers to the laws of the people of earlier revelation – *Ahl al-Kitab*.

According to Kamali:¹¹²

In a reference to the Torah, the Qur'an confirms its authority as a source of inspiration and guidance: *"We revealed the Torah in which there is guidance (huda) and light; and prophets who submitted to God's will have judged the Jews by the standards thereof"* (Al-Ma'idah, 5:44).

It is thus observed that Muhammad, being one of the Prophets, is bound by the guidance that is found in the Torah. Further confirmation for the basic harmony of the divinely revealed laws can be found in the Qur'anic verse (*ayah*) which, in a reference to the previous Prophets, directs the Prophet of Islam to follow their guidance: *'Those are the ones to whom God has given guidance, so follow their guidance [hudahum]'* (al-Anam, 6:90).

Basing themselves on these and similar proclamations in the Qur'an, the ulema agree that all the revealed religions are different manifestations of an essential unity.¹¹³ This is, of course, not to say that there are no differences between them. Since each one of the revealed religions was addressed to different nations at different points of time, they each have their distinctive features which set them apart from the rest. In the area of *halal* and *haram*, for example, the rules that are laid down by different religions are not identical. Similarly, in the sphere of devotional practices and the rituals of worship, they differ from one another even if the essence of worship is the same. The *Shari'ah* of Islam has retained many of the previous laws, while it has in the meantime abrogated or suspended others. For example, the law of retaliation (*qisas*) and some

¹¹² Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, p. 306-12.

¹¹³ Muhammad Abu Zahara, *Usul al-Fiqh*, Dar Al-Fikr al-Arabi, Cairo, 1958, p. 241 cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.306-308.

of the *hadd* penalties which were prescribed in the Torah have also been prescribed in the Qur'an.¹¹⁴

However, the general rule to be stated here is that notwithstanding their validity in principle, laws that were revealed before the advent of Islam are not applicable to Muslims. This is especially so with regard to the practical rules of *Shari'ah*, that is, the *ahkam*.... The jurists are also in agreement to the effect that the laws of the previous religions are not to be sought in any source other than that of the *Shari'ah* of Islam itself; for the rules of other religions do not constitute a binding proof as far as Muslims are concerned. The *Shari'ah*, in other words, is the exclusive source of all law for Muslims.¹¹⁵

In view of the ambivalent character of the evidence on this subject however, the question has arisen as to the nature of the principle that is to be upheld; whether to regard the laws preceding the *Shari'ah* of Islam as valid unless they are specifically abrogated by the *Shari'ah*, or whether to regard them as basically nullified unless they are specifically upheld. In response to this, it is said that laws that were introduced in the previous scriptures but which are not upheld by the *Shari'ah*, and on which no ruling is found in the Qur'an or the *Sunnah* are not, according to general agreement, applicable to Muslims. The correct rule regarding the enforcement of the laws of the previous revelations is that they are not to be applied to the followers of Islam unless they are specifically upheld by the *Shari'ah*.¹¹⁶

¹¹⁴ See Muhammad Abu Zahara, *Usul al-Fiqh*, Dar Al-Fikr al-Arabi, 1958, p.242 and; Abu al-'Aynayn Badran, *Usul al-Fiqh al-Islami*, Mu'assassah Shahab al-Jami'ah, Alexandria, 1984, p.237 cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.306-308.

¹¹⁵ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.306-308.

¹¹⁶ Abu al-'Aynayn Badran, *Usul al-Fiqh al-Islami*, Mu'assassah Shahab al-Jami'ah, Alexandria, 1984, p. 234; Abd al-Hamid Abu al-Makarim Isma'il, *Al-Adillah al-Mukhtalaffihawa Atharuha fi al-Fiqh al-Islami*, Dar al-Muslim, n.d, p. 320, cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.306-308.

DISCUSSION QUESTIONS:

1. What is meant by *Shar'u man Qablana*?
2. Give textual evidence used to justify the validity of *Shar'u man Qablana*.
3. List some examples of *Shar'u man Qablana*.
4. Discuss some of the differing opinions among scholars regarding the validity of *Shar'u man Qablana*.

LESSON 16: SECONDARY SOURCE: *AL-MASALIH AL-MURSALAH*

Al-Masalih al-Mursalah (also known as *Maslahah* or *Istislah*) is the consideration of “unstated” public interests which may not be explicitly identified in any text in the Qur’an or Sunnah but which are generally agreed upon based on circumstances which arise in human society. They are of three types.

Those *masalih* (plural of *maslahah*) – “welfare”, “benefits”, “general good”, “public interests”, “things done for a good purpose”, etc., - that are supported and approved by textual evidence of the Qur’an and Sunnah, are accepted by most scholars, and they usually fall under the discussion or category of “Analogy” (*Qiyas*), especially when used as the bases for discussing the legal reasons (*‘illah*) or wisdom (*hikmah*) behind a textual injunction. These *masalih* are often described as ***masalih al-mu’tabarah*** – i.e., (textually) supported, endorsed or accredited interests.

Those interests (*masalih*) that contradict or oppose the sources or objectives (*maqasid*) of Shari’ah are rejected by scholars, and described as ***al-masalih al-mulgha*** – textually discredited, rejected or invalid interests.

Those interests or benefits (*masalih*) that are neither explicitly supported nor rejected by any specific legal text of the Qur’an or Sunnah, but are in line with the objectives (*maqasid*) of Shari’ah are described as ***al-masalih al-mursalah***. They are *masalih* because they deal with the acquisition of benefit or utility, and removal of harm or evil. The term *mursalah* (“unstated”, unrestricted or “untethered”) indicates the absence of direct textual evidence for them.¹¹⁷

In its constructive application, the unstated good (*al-masalih al-mursalah*) is a principle or tool of legal reasoning whereby unprecedented rulings are legislated to secure the best interest of

¹¹⁷ Wahbah al-Zuhaili, *Usul al-Fiqh al-Islami*, 2 vols., Damascus, Dar al-Fikr, 1406/1986, 2:757 – cited in Wan Azhar Wan Ahmad, *Public Interests (Al-Masalih Al-Mursalah) in Islamic Jurisprudence: An Analysis of the Concept in the Shafi’i School*, ISTAC & IIUM, Kuala Lumpur, Malaysia, 2003, p.6-7.

individuals or societies that are without textual precedent. *Al-masalih al-mursalah* consequently has both a preclusive and a protective application, according to which it suspends normative applications of the law for the welfare of society.¹¹⁸

The texts used to show authority for *Maslahah*, *Sadd al-Dhari'ah* and *Istihsan* are all similar as they are all connected to the objectives (*Maqasid*) of *Shari'ah*. The following texts have been used to support the authority of public interest (*Maslahah*).

"And We have not sent you, (O Muhammad), except as a mercy to the worlds." (Qur'an 21:107)

"O Mankind, there has come to you instruction from your Lord and healing for what is in the breasts, and guidance and mercy for the believers" (Qur'an 10:57)

"And strive for Allah with the striving due to Him. He has chosen you and has not placed upon you in the religion any difficulty..." (Qur'an 22:78)

"Allah does not intend difficulty for you..." (Qur'an 5:6)

The Hadith of repositioning the Ka'bah as reported by A'isha that the Messenger of Allah (ﷺ) said, *"Had not your people been still close to the pre-Islamic Period of Ignorance, I would have repositioned the Ka'bah and made two doors in it; one for entrance and the other for exit."*¹¹⁹ (I.e. the Prophet (p) considered the potential consequences of the peoples' ignorance to social unrest and public interest as a reason or basis for his legislation to not reposition the Ka'bah, which he would otherwise have done).

He also said, *"No harm shall be inflicted or reciprocated in Islam."*¹²⁰

¹¹⁸ Abu Zahra, *Malik*, 390; Al-Zarqa, *Fiqh*, 1:97-98; Al-Fasi, *Maqasid*, 138-144; Al-Dawalibi, *Madkhal*, 99 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.174-175.

¹¹⁹ Al-Bukhari, *Sahih al-Bukhari*, vol.1, book 3, no. 128.

¹²⁰ Ibn Majah, no. 2340

“Muslims are bound by their stipulations unless it be a condition which turns a Haram into halal or Halal into Haram.”¹²¹

A’isha reported that *“...whenever the Prophet (ﷺ) was asked to choose between one of two options he chose the easiest of them so long as it did not amount to a sin...”¹²²*

The authority for *maslahah* also comes from the *ijtihad* of some companions of the Prophet (ﷺ). Two examples of this are the first and second compilation of the Qur’an during the Caliphate of Abu Bakr and ‘Uthman to ensure its safety, and the burning of the copies of Qur’an which differed from the authentic official copy as ordered by ‘Uthman during his tenure (and approved by other Companions of the Prophet (ﷺ) who were present at that time). In these examples, the interest of preserving the original Qur’an for later generations and non-Companions was the basis for measures taken. Other examples include the second call (*Adhan*) of Friday prayer added by ‘Uthman due to the increase in the Muslim population of Medina¹²³; the declaration by ‘Umar of a triple-divorce pronounced at one occasion to be as irrevocable as three separate divorces¹²⁴; the temporary suspension of divinely-stipulated punishment for theft (*hadd al-sariqah*) by ‘Umar due to famine¹²⁵; and ‘Umar’s refusal to share some fertile lands conquered by the Muslim soldiers among them as booty because he wanted to preserve the lands for future generations.¹²⁶

More contemporary examples of unstated interests (*maslahah*) include the paving of roads, the setting up of administrative offices to handle public utilities, the development of traffic rules,

¹²¹ Muslim, *Sahih Muslim*, no. 3587

¹²² Al-Bukhari, *Sahih al-Bukhari*, no. 3367; Muslim, *Sahih Muslim*, no. 6190

¹²³ Muhammad al-Amin bn Muhammad bn al-Mukhtar al-Shinqiti, *al-Masalih al-Mursalah*, Madinah: Al-Jami’ah al-Islamiyyah, 1410, p.10 & 12; al-Bukhari, *Sahih al-Bukhari*, vol.6, hadith nos. 201 & 509; vol.9, no.301, Alim 6.0

¹²⁴ Muslim, *Sahih Muslim*, no.3746

¹²⁵ Ibn al-Mulaqqan, *Al-Badr al-Munir fi Takhrij al-Ahadith Wa al-Athar al-Waqi’ah fi al-Sharh al-Kabir*, Saudi Arabia: Dar al-Hijrah, 1425, vol.8, p.679; ‘Atiyah bin Muhammad Salim, *Sharh Bulugh al-Maram, al-Maktabah al-Shamilah*, 3.13, 1420, p.12

¹²⁶ Al-Bukhari, *Sahih al-Bukhari*, no.2334; For more examples of the application of *al-masalih al-mursalah* during the period of the Rightly Guided Caliphs, the Period of the Successors, the Followers of the Successors, etc., see Wan Azhar Wan Ahmad, *Public Interests (Al-Masalih Al-Mursalah) in Islamic Jurisprudence: An Analysis of the Concept in the Shafi’i School*, ISTAC & IIUM, Kuala Lumpur, Malaysia, 2003, p.17-56.

environmental laws, taxation systems, food security systems, Geographic Information Systems, modern land tenure systems, the construction of sewers and waste disposal facilities, etc.¹²⁷

While **Imam Malik** and **Imam Ahmad bin Hanbal** considered this tool to be a valid independent source of *Shari'ah* in the absence of contradictory evidence from Qur'an, *Sunnah* or *Ijma'*, other Juristic Schools like the Shafi'i¹²⁸, Hanafi and Zahiri did not consider it a valid independent source.¹²⁹ The Hanafis regard this tool as subsumed and already incorporated under *Istihsan*¹³⁰(discussed further in Lesson 17).

Although “public interest” or the “unstated good” (*al-masalih al-mursalah*) is not recognized as an independent or distinctive legal principle in Hanafi and Shafi'i legal reasoning, both schools have a pragmatic concern for the general good and attainment of the higher objectives (*maqasid*) of *Shari'ah*. Shafi'i for example held that the benefits entailed in *al-masalih al-mursalah* were amply set forth in Islam's textual sources. The chief difference therefore between the Shafi'i and Maliki, therefore, was over the issue of the unstated (*irsal*) aspect of general benefit and the question of which elements pertaining to the general good are not tied down to specific texts or cannot be adequately inferred from them, and hence based on a more abstract perception of the general good.¹³¹

¹²⁷ Gamal Eldin Attia, *Towards Realization of the Higher Intents of Islamic Law: Maqasid al-Shari'ah, A Functional Approach*, IIIT, London, 2007, p.289.

¹²⁸ For a more detailed discussion of the more formal adoption and development the subject of “unstated good” (*al-Masalih al-Mursalah*) among later scholars of the Shafi'i School, (especially the contributions of Imam al-Haramayn al-Juwayni, Abu Hamid al-Ghazali, and Fakhr al-Din al-Razi), see Wan Azhar Wan Ahmad, *Public Interests (Al-Masalih Al-Mursalah) in Islamic Jurisprudence: An Analysis of the Concept in the Shafi'i School*, ISTAC & IIUM, Kuala Lumpur, Malaysia, 2003, p.91-132. For further reading, see: Tariq Ramadan, *To be a European Muslim*, p.78; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.362-365.

¹²⁹ Abdul Wahab Khallaf, *Masadir al-Tashri' al-Islami Fima la Nass Fihi*, Kuwait, Dar al-Qalam, 1414, 6th edition, p.89; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.245-247.

¹³⁰ Abdul Wahab Khallaf, *Masadir al-Tashri' al-Islami Fima la Nass Fihi*, Kuwait, Dar al-Qalam, 1414, 6th edition, p.89.

¹³¹ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.176

Al-Shatibi and Al-Qarafi insisted that the purpose of attaining good (*masalih*) could be theologically attributed to God. They argue that the fact that general benefits are central to the ultimate purposes of Islamic law is not a matter of speculative theology, but is empirically based on the inductive study (*istiqrāʾ*) of the revealed sources of Prophetic law.¹³²

DISCUSSION QUESTIONS:

1. What is meant by *al-Maslahah al-Mursalah*?
2. What are some of the textual evidences used to justify the consideration of “unstated benefits” (*al-masalih al-mursalah*)?
3. How could there be textual evidence for *al-masalih al-mursalah*, if by definition, these are non-textual or “unstated” by the Qur’an or Sunnah?
4. Give some examples of the application of *al-maslahah al-mursalah* in the lives of Companions and in contemporary society.
5. List some of the differing positions among classical scholars about *al-Maslahah al-Mursalah*.

¹³² Al-Shatibi, *Al-Muwafaqat*, 2:6, 1:148; Al-Qarafi, *Al-Dhakhira* (Cairo), 1:142-143, 72-73; Ibn Rushd, *Bidayat al-Mujtahid*, 2:5, 38 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.177.

LESSON 17: SECONDARY SOURCE: *ISTIHSAN*

Istihsan literally means “to approve or to deem something preferable”. It is derived from “*hasana*”, which means being good or beautiful.

Technically, *istihsan* means juristic preference or discretion. This refers to the exercise of juristic discretion in situations which the jurist deems unique or exceptional and therefore cannot be equitably handled by existing law, or situations where application of the existing law could lead to unfairness or hardship. In the case of the latter instance, *istihsan* is viewed either broadly or restrictively. In a broad sense, *istihsan* is a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcement of the existing law.

In a more restrictive sense, *istihsan* refers to a decision to refrain from using a ruling given for an *analogous* situation in favour of another ruling which is more in keeping with the intents of the Law. In other words, juristic preference involves giving human interests and intents of Law priority over the results of analogical deduction (*qiyas*).¹³³ *Istihsan* is meant to ensure that harm or hardship (*mafsada*) is not created in the normal “logical” application of *qiyas* or any other legal principles or proofs (*adillah*).

“Juristic preference” or “discretion” is a fitting description of *istihsan*, as it involves setting aside an established analogy in favour of an alternative ruling which serves the ideals of justice and public interest in a better way.¹³⁴

¹³³ Gamal Eldin Attia, *Towards Realization of the Higher Intents of Islamic Law: Maqasid al-Shari’ah, A Functional Approach*, IIIT, London, 2007, p.288; See also, Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.122-125; Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.102-107

¹³⁴ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 324-325.

Irrespective of the scope of application given to *istihsan*, a common thread that runs through all renditions of it is as defined by Ibn Rushd in *Bidayat al-Mujtahid* as “attention (*al-iltifat*) to the general benefit (*maslahah*) and justice (*al-‘adl*).”¹³⁵

Thus, according to **Ibn al-'Arabi**, “*istihsan* is to abandon, in the form of an exception, what is required by the law because applying the existing law would lead to a departure from some of its own objectives.”¹³⁶ On a similar note, Al-Shatibi says *Istihsan* is “putting aside the necessary consequences of a legal directive by way of making an exception to it through granting a special license (*tarakhkhus*) because of the contradicting (*mu‘arada*) of special circumstances.”¹³⁷

Istihsan is therefore the movement from one source of evidence (such as *ijma‘*, *qiyas*, etc.) to another different one (such as *urf*, *ra‘yi* al-Sahabi, etc.) which is more appropriate or suitable to the context under consideration. This more appropriate evidence could be based on consensus (*ijma‘*), custom (*urf*), “unstated public interest” (*maslahah al-mursalah*), or the principle of “removal of hardship” (*raf‘ al-haraj*), etc.¹³⁸

The authority for *istihsan* usually comes from the following Qur’anic verses:

“God intends ease for you, and He does not want to put you in hardship.” (Qur’an 2: 185)

“Those who listen to the word and follow the best of it.” (Qur’an 39: 18)

¹³⁵ Ibn Rushd, *Bidayat al-Mujtahid*, 2:112 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.163.

¹³⁶ “*Al-istihsan huwa tark muqtada al-dalil ‘ala tariq al istithna’ wa-l-tarakhkhus li-mu‘aradah ma yu‘arad bihi fi ba’d muqtadayatih.*” See Ibn al-Arabi, *Ahkam al-Qur’an*, II, 57. A discussion of Ibn al-'Arabi's definition also appears in Shatibi’s *Al-Muwafaqat*, (ed. Diraz), IV, 208, cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 327-328.

¹³⁷ Al-Shatibi, *I’tisam*, 2:320-321 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.162-163.

¹³⁸ Hussein Hamid Hassan, *Fiqh al-Maslahah wa Tatbiqatuhu al-Mu‘asirah*, Jeddah, IDB, 1993, p. 55; Al-Shatibi, *Al-Muwafaqat*, 3:60-76; 4:233-243 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.164.

“And follow the best of what has been sent down to you from your Lord.” (Qur'an 39:55)¹³⁹

The following *ahadith* have also been quoted in support of *istihsan*:

*“What the Muslims deem to be good is good in the sight of God.”*¹⁴⁰

*“No harm shall be inflicted or reciprocated in Islam.”*¹⁴¹

*“The best of your religion is that which brings ease to the people.”*¹⁴²

Al-Khudari explains that in their search for solutions to problems, the Companions and Successors resorted in the first place to the Qur'an and the normative example of the Prophet (ﷺ), but when they found no answer in these sources, they exercised their personal opinion (*ra'y*), which they formulated in the light of the general principles and objectives of the *Shari'ah*.

This is illustrated, for example, in the judgment of 'Umar ibn al-Khattab in the case of Muhammad ibn Salamah's neighbour. The Caliph was approached by Ibn Salamah's neighbor for permission to extend a water canal through Ibn Salamah's property. The neighbor was granted the request on the ground that no harm was likely to accrue to Ibn Salamah, and extending a water canal was to his manifest benefit.¹⁴³

Istihsan has also been suggested in the ruling of Caliph 'Umar ibn al-Khattab to waive the *hadd* penalty of the amputation of the hand for theft during a widespread famine, as well as his ruling to ban the sale of slave-mothers (*ummahat al-awlad*), and his ban for the Companions to remain

¹³⁹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, p. 328-329.

¹⁴⁰ Al-Amidi (*Ihkam*, I, 241) considers this to be a Hadith but it is more likely to be a saying of the prominent companion, 'Abd Allah Ibn Mas'ud; see also Shatibi, *I'tisam*, II, 319.]; cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.323-350.

¹⁴¹ Ibn Majah, *Sunan*, vol.2, p.784, no. 2340; al-Shatibi, *Al-Muwafaqat* (ed. Diraz), III, 17; Khudari, *Tarikh*, p. 199, cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.323-350.

¹⁴² Sarakhsi, *al-Mabsut*, vol. X, p. 145; Ibn Hanbal, *Musnad*, Dar al-Fikr: Beirut, vol., V, 22, n.d. cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.325-326.

¹⁴³ Muhammad al-Khudari, *Tarikh al-Tashri' al-Islami*, 7th ed., Dar al-Fikr, Beirut, 1981, p.199, cited in Kamali, op. cit.

married to Jewish and Christian women (*kitabiyat*).¹⁴⁴ ‘Umar set aside the established law in these cases on grounds of his assessment of equity, justice and public interest.¹⁴⁵

‘Umar also judged that *zakat* be charged on horses during his reign even though the Prophet (ﷺ) explicitly mentioned that there should be no *zakat* on horses. He did this because at his time circumstances had changed and horses were becoming more valuable than the camels upon which *zakat* was to be paid. He departed from the hadith because, at his time, it would have been unjust for people with less valuable property (camels) to pay *zakat* while those with more valuable property (horses) do not pay it.¹⁴⁶ ‘Umar judged that adherence to the wisdom or underlying cause for the initial ruling should be given preference over adherence to its literal reading.

Another interesting case of *istihsan* from ‘Umar, concerns the inheritance of two half-brothers. The case concerned a woman who died and left behind her husband, her mother, two half-brothers, and two full brothers. Initially, the Caliph applied the usual ruling, based on an established precedent as evident in the Qur’an and demonstrated by the Prophet (ﷺ). This involved two categories: the *Ahl al-farai’d* (those whose portion has been designated or fixed in the Qur’an) and *ahl al-isabah* (the residual heirs). The *Ahl al-fara’id* have definite priority over the *Ahl al-isabah* in the distribution of property. Upon this basis, ‘Umar gave one-half of the property to the husband of the deceased woman; one-sixth to her mother, and one-third to the uterine brothers. No portion was given to the half-brothers as they were considered residual heirs.

The half-brothers contested the case saying, “Suppose our father was a donkey (*himar*), do we not still have the same mother as the deceased?” Consequently, ‘Umar revised his first decision based on the consideration of equity and justice. Then, he found a stronger reason to depart from the established ruling to a new ruling, which he approved of as the better judgment (*‘istahsana’*). He ordered that the one-third of the property that remained should be distributed

¹⁴⁴ *Umm al-walad* is a female slave who has borne a child to her master, and who is consequently free upon his death. A *kitabiyah* is a woman who is a follower of a revealed religion, namely Christianity and Judaism.

¹⁴⁵ Ahmad Hasan, *The Early Development of Islamic Jurisprudence*. Islamic Research Institute, Islamabad, 1970, p.145.

¹⁴⁶ Jasser Auda, *Maqasid al-Shariah: A Beginner’s Guide*, IIIT, London, 2008, p.12.

equally among both full and half-brothers. This distribution would take place after the deduction of the husband's and mother's fixed portions. The case later came to be known as "The Donkey Case (*Mas'alat al-Himariyyah*)".¹⁴⁷

Also, the Hanbali scholar, **Ibn Taimiyyah**, made use of *istihsan* to allow a woman in her menstruation to perform the Compulsory *Tawaf* of *Hajj* (*Tawaf al-ifadah*) before leaving for home if the group she went to the Hajj pilgrimage with could not wait for her.¹⁴⁸

Imam Malik used to say that juristic discretion (*istihsan*) constituted nine-tenths (90%!) of legal knowledge.¹⁴⁹

In the Hanafi school, *istihsan* is often regarded as a form of "inconspicuous analogy" (*al-qiyas al-khafi*), and there are various types of these.¹⁵⁰ Al-Shatibi argues that juristic discretion (*istihsan*) is no less a valid form of legal reasoning than analogy (*qiyas*). It is required, so as to ensure that the law is applied to new circumstances (as in the case of *qiyas*) with justice and fairness in a manner that is consistent with its overall purpose.¹⁵¹

While the Hanafi, Maliki, and Hanbali jurists have validated *istihsan* as a subsidiary source of law, the Shafi'i, Zahiri and Shi'i (Shi'a) *ulama* reject it altogether and refuse to give it any credence in their formulation of *Usul al-Fiqh*.¹⁵² Rather, "in almost all cases where the Hanafis and Malikis

¹⁴⁷ Saim Kayadibi, *Istihsan: The Doctrine of Juristic Preference in Islamic Law*, Islamic Book Trust, Selangor, 2010, p.118-119.

¹⁴⁸ Ali bin Muhammad bin Abbas Ala'udeen, *Al-Ikhtiyarat al-Fiqhhiyyat min Fatawa Shaykh al-Islam Ibn Taimiyyah*, Dar al-Iman, Egypt, p.206; Muhammad bin Abu Bakr Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'in an Rabb al-Alamin*, Maktab al-Kulliyat al-Azhariyyah, 1388 AH/1968, vol.3, p.13-15.

¹⁴⁹ Al-Shatibi, *al-I'tisam*, 2:320 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.162

¹⁵⁰ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.168.

¹⁵¹ Al-Shatibi, *Al-I'tisam*, 2:320 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.163.

¹⁵² Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.324.

have applied *istihsan* or custom (*'urf*), the Shafi'is have resorted to *istishab*.”¹⁵³ The topic of *istishab* is discussed in more detail in Lesson 13.

One of the most interesting applications of juristic discretion (*istihsan*) is when it is based on the legal principle of “heeding dissent” (*ri'ayat al-khilaf*). Scholars would sometimes “heed the dissent” of other prominent jurists by modifying their own opinions, not just for the sake to unity, but out of courtesy and “respect for the other opinion” or school.¹⁵⁴

According to some authors, almost all instances of *istihsan* are actually the illustrations for *al-masalih al-mursalah*.¹⁵⁵

***Istihsan* and “Equity”**

There is an obvious parallel between the concept of equity (in Western Law) and *istihsan*. According to Kamali, however, although they bear a close similarity to one another, the two are not identical. “Equity” is a Western legal concept which is grounded in the idea of fairness and conscience, and derives legitimacy from a belief in natural rights or justice beyond positive law. It has been defined as “Primarily fairness or natural justice. A fresh body of rules by the side of the original law, founded on distinct principles, and claiming to supersede the law in virtue of a superior sanctity inherent in those principles. Equity is the body of rules formulated and administered by the Court of Chancery to supplement the rules and procedure of the Common Law.”¹⁵⁶

Istihsan in Islamic law, and equity in Western law, are **both inspired by the principle of fairness and conscience, and both authorise departure from a rule of positive law when its enforcement leads to unfair results**. The main difference between them is, however, to be

¹⁵³ Abu Zahra, *Usul al-Fiqh*, p. 241, cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.267. For further reading on *Istihsan* see Saim Kayadibi, *Istihsan: The Doctrine of Juristic Preference in Islamic Law*, Islamic Book Trust, Selangor, 2010

¹⁵⁴ Al-Shatibi, *Al-I'tisam*, 2:329-330 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.164-165.

¹⁵⁵ Wan Azhar Wan Ahmad, *Public Interests (Al-Masalih Al-Mursalah) in Islamic Jurisprudence: An Analysis of the Concept in the Shafi'i School*, ISTAC & IIUM, Kuala Lumpur, Malaysia, 2003, p.46.

¹⁵⁶ Osborn's *Concise Law Dictionary*, p. 124; cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.217.

sought in the overall reliance of equity on the concept of natural law, and of *istihsan* on the underlying values and principles of the *Shari'ah*. But this difference need not be over-emphasised if one bears in mind the convergence of values between the *Shari'ah* and natural law. Notwithstanding their different approaches to the question of right and wrong, for example, the **values upheld by natural law and the divine law of Islam are substantially concurrent**.

Briefly, both assume that right and wrong are not a matter of relative convenience for the individual, but derive from an eternally valid standard which is ultimately independent of human cognizance and adherence. From an Islamic perspective, right and wrong are determined, not by reference to the 'nature of things', but because God has determined them as such.¹⁵⁷

DISCUSSION QUESTIONS:

1. What is the meaning of *Istihsan*?
2. Give at least 3 texts used by scholars to justify *Istihsan* as a source of *Shari'ah*.
3. Give at least 3 cases of the application of *Istihsan* in the lives of the Companions.
4. Give reasons for some of the differences of opinions among jurists on the validity of *Istihsan* as an independent source of *Shari'ah*.
5. What are the similarities and differences between *istihsan* and "equity" in Common/Western Law?

¹⁵⁷ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.217

LESSON 18: SECONDARY SOURCE: *SADD AL-DHARA'I*

Sadd al-Dhara'i is a tool that enables preclusion or “blocking the means” to a prohibition. This is used to determine the prohibition of evasive legal devices, or of anything which has the potential of leading to that which is forbidden.¹⁵⁸ The opposite, according to Al-Qarafi, is *Fath al-Dhara'i*, or “opening the means”.¹⁵⁹ Both tools show a concern for consequences of decisions and the attainment of the objectives (*maqasid*) of Shari’ah in Islamic Jurisprudence.

The concept of juristic discretion (*istihsan*) often functions as the opposite of preclusion/“blocking the means” (*sadd al-dhara'i*). While juristic discretion is used to systematically permit what would not be allowed according to strict application of legal proofs (*adillah*), preclusion is used to prohibit what systematic application of proofs would ordinarily permit.¹⁶⁰

The authority for *sadd al-dhara'i* is derived from the following texts that show a concern for consequences:

“And do not revile those who call upon other than Allah, in case they revile Allah out of spite and ignorance.” (Qur’an 6: 108)

“...and let them (women) not strike (stamp) their feet (on the ground) so as to make known what they conceal of their adornments.” (Qur’an 24: 31)

“O you who believe! When the call is proclaimed to prayer on the day of Jummah (Friday), then hasten earnestly to the remembrance of Allah and leave trade. That is best for you, if you only knew.” (Quran 62:9)

According to Kamali, authority is also found for the principle of *sadd al-dhara'i* in the *Sunnah*, especially the ruling in which the Prophet forbade a creditor from taking a gift from his debtor

¹⁵⁸ Gamal Eldin Attia, *Towards Realization of the Higher Intent of Islamic Law: Maqasid al-Shari’ah, A Functional Approach*, IIIT, London, 2007, p.291.

¹⁵⁹ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.241, 125-127.

¹⁶⁰ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.162.

lest it became a means to usury and the gift a substitute to *riba*. The Prophet also forbade the killing of hypocrites (*al-munafiqun*) and people who were known to have betrayed the Muslim community during battles. It was feared that killing such people would become a means to evil, namely, of giving rise to a rumour that 'Muhammad kills his own Companions'¹⁶¹ which would, in turn, provide the enemy with an excuse to undermine the unity of the Muslim community. Consequently, the Prophet put a ban on killing the *munafiqun*. On a similar note, the Prophet suspended enforcement of the *hadd* penalty for theft during battles so as to avoid defection to enemy forces. It was for this reason, namely to block the means to an evil, that the army commanders were ordered not to enforce the prescribed (*hadd*) penalties during military engagements.¹⁶²

An example of *sadd al-dhara'i* is found in the following hadith:

Narrated by Abdullah bin 'Amr, the Prophet (ﷺ) said, *"It is one of the greatest sins that a man should curse his parents."* It was asked, *"O Allah's Apostle! How does a man curse his parents?"* The Prophet said, *"The man abuses the father of another man and the latter abuses the father of the former and abuses his mother."*¹⁶³

Another example of *sadd al-dhara'i* is when the leading Companions permitted inheritance to be received by a divorced woman whose husband had irrevocably divorced her during his terminal illness in order to exclude her from inheritance. The act of instigating a divorce upon one's death bed was forbidden by the Companions so that a divorce of this kind would not become a means to abuse. It is also reported that during the time of the Caliph 'Umar ibn al-Khattab, one of his officials, Hudhayfah, married a Jewish woman in al-Mada'in. The Caliph wrote to him saying that he should divorce her. Hudhayfah then asked the Caliph if the marriage was unlawful. To this, the Caliph replied that it was not unlawful but that his example might be recklessly followed by others who might be lured by the beauty of the women of *ahl al-*

¹⁶¹ Al-Shatibi, *Muwafaqat*, vol.4, p.62; Shalabi, *Fiqh*, p.187; cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.400.

¹⁶² Abu Zahrah, *Usul al-Fiqh*, p.229; Shalabi, *Fiqh*, p.187; Isma'il, *Adillah*, p. 200; cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.400.

¹⁶³ *Sahih Muslim*, no.273.

dhimmah. The Caliph thus forbade something which the Qur'an had declared lawful so as to block the means to an evil as he perceived it at the time.¹⁶⁴

It is also supported or expressed in the well-known legal maxim: "Whenever a (particular) harm exceeds (*arbata 'ala*) a benefit, the legal injunction must be handed down with a view to (annulling) the harm."¹⁶⁵

Yet another example of *sadd al-dhara'i* is the ruling that seclusion (*khalwah*) between unrelated members of the opposite sexes is prohibited because it could lead to immoral conduct (*fahisha* or *zina*).¹⁶⁶

According to **Ibn Qayyim al-Jawziyyah**, preclusion (*sadd al-dhara'i*) constituted one-fourth (25%!) of the religious obligation (*taklif*) of the law.¹⁶⁷ He lists over 90 examples of *sadd al-dhara'i* rulings by the learned Companions and subsequent generations of scholars.¹⁶⁸

More contemporary examples of rulings based on *sadd al-dhara'i* include the prohibition of the various ways through which alcohol consumption is facilitated¹⁶⁹; the prohibition of transactions that facilitate usury/interest (*riba*) such as unnecessary "middle-men" in business; the prohibition of the sale of organs or body-parts; the prohibition of individuals carrying weapons on airplanes and other means of transport; and of selling weapons during civil crisis, etc.

While some jurists seem to regard the intent of the action as relevant to its judgment, others only evaluate the action itself and its potential consequences. Hence, in this latter opinion, it is not necessary for the jurist to know for certain the legitimacy of the intention behind the action in question before precluding or "blocking" it. Where the illegitimate intent was explicitly clear, and the consequences of the outwardly permissible action were also illegitimate, then most

¹⁶⁴ Cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.400

¹⁶⁵ Al-Shatibi, *Al-Muwafaqat*, 4:272; 1:174 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.171.

¹⁶⁶ Al-Bukhari, no. 3006 and 5233; Muslim, no. 3336.

¹⁶⁷ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.170.

¹⁶⁸ Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'in*, Maktabat Kulliyah al-Azhariyyah, Cairo, 1968, vol.3, p.14-50.

¹⁶⁹ *Mu'jam al-Tabarani al-Kabir*, vol.11, p.323; *Sunnan al-Bayhaqi al-Kubra*, Dar al-Baz, 1414 AH, Mecca, no. 10559; *Sunnan Abu Dawud*, Dar al-Fikr, no. 3674.

scholars (including Hanafi and Shafi'i) who objected to *Sadd al-dhara'i* would regard its usage as legitimate.¹⁷⁰

According to Kamali,

The *ulema* are, however, in disagreement over the validity of *sadd al-dhara'i*. The Hanafi and Shafi'i jurists do not recognise it as a principle of jurisprudence in its own right, on the grounds that the necessary ruling regarding the means can be derived by recourse to other principles such as *qiyas*, and the Hanafi doctrines of *istihsan* and '*urf*. But the Maliki and Hanbali jurists have validated *sadd al-dhara'i* as a proof of *Shari'ah* in its own right. Despite the different approaches that the *ulema* have taken to this doctrine, the Maliki jurist **al-Shatibi** has reached the conclusion that the *ulema* of various schools are essentially in agreement over the conceptual validity of *sadd al-dhara'i* but have differed in its detailed application. Their differences relate mainly to the grounds which may be held to constitute the means to something else, and also to the extent to which the concept of *sadd al-dhara'i* can be validly applied.¹⁷¹ **Abu Zahrah** has reached essentially the same conclusion by observing that the Shafi'i and Hanafi jurists are for the most part in agreement with their Maliki and Hanbali counterparts, and that they differ only in regard to some issues.¹⁷² ...It is perhaps well to remember at this point that notwithstanding the application of *sadd al-dhara'i* in respect of opening the means to beneficence (*maslahah*), it is usually the prevention of evil (*mafsadah*) that acquires greater prominence in the discussion of this principle.¹⁷³

According to another author, "all forms of *ijtihad* are actually aimed at conformity with the sources and objectives of *Shari'ah*, either explicitly or implicitly. Therefore, the controversy over the question of *istihsan* and *al-masalih al-mursalah* is due to the different terminologies used.

¹⁷⁰ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.171-172.

¹⁷¹ Al-Shatibi, *Muwafaqat*, vol.4, p.201. Cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.401.

¹⁷² Abu Zahrah, *Usul*, p.227-228. Cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.401.

¹⁷³ Cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.401.

As a concept, there is no substantial disagreement among jurists, and the consideration of public interests has been applied by all parties.”¹⁷⁴

DISCUSSION QUESTIONS:

1. Explain the meaning of *Sadd al-Dhara'i'*.
2. Give textual evidence used to justify the use of *Sadd al- Dhara'i'* as a secondary source of *Shari'ah*.
3. List some examples of the application of *Sadd al- Dhara'i'* in the life of the Companions.
4. Discuss some of the different opinions among scholars on the validity of the *Sadd al-Dhara'i'*.
5. What do *Istihsan*, *al-masalih al-mursalah*, and *sadd al-dhara'i* have in common with each other?

¹⁷⁴ Wan Azhar Wan Ahmad, *Public Interests (Al-Masalih Al-Mursalah) in Islamic Jurisprudence: An Analysis of the Concept in the Shafi'i School*, ISTAC & IIUM, Kuala Lumpur, Malaysia, 2003, p.135

LESSON 19: ON THE “SAFETY-NET” PRINCIPLES AND TOOLS OF *IJTIHAD* - Protecting the Spirit of Shari’ah

For gymnasts, trapeze artists and acrobats in a circus, there is usually a strong safety-net to catch falling performers in case of accidents when something fails. Each School of law developed their own “safety-net principles” to ensure that in their use of the various tools and principles of *ijtihad*, they had a means of trying to ensure that the spirit and objectives (*maqasid*) of Shari’ah were always protected and not sacrificed.¹⁷⁵ These safety-net tools and principles were also useful for cross-checking the quality of *ijtihad* and making sure that the negative social effects of any weakness in the competence of a scholar were minimised. According to some authors, this protection of the objectives of Shari’ah and minimising the effects of mistaken verdicts by more literalist approaches to the text was one of the major concerns of those jurists and scholars who were (usually, derogatorily) referred to as “People of Considered Opinion” (*Ahl al-Ra’yi*).¹⁷⁶

MAQASID PRINCIPLES AND TOOLS: Legal instruments based on inference (*istidlal*)

¹⁷⁵ The term “Safety-net principles” was coined by Sheikh Dr. Sherman A. Jackson, “Fiction and Formalism: Toward a Functional Analysis of *Usul al-Fiqh*,” in *Studies in Islamic Legal Theory*, Leiden, Brill, 2002, p.195 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.158-159. The DIN researchers and editors of this material believe it is a very appropriate metaphor for capturing the functions of these “*maqasid* tools” of *ijtihad*.

¹⁷⁶ ... As opposed to “People of Narration” (*Ahl al-Hadith* or *Ahl al-Athar*). Very often, when applied to jurists, “considered opinion” (*ra’yi*) as used in the early formative period of Islamic jurisprudence, was a “composite term”. It included various methods of legal reasoning, especially juristic preference or discretion (*istihsan*), preclusion or blocking the means (*sadd al-dhara’i*), and the unstated public good (*masalih al-mursalah*). In the Maliki School, it also included reference to the praxis or practice (*amal*) of Medina. In the opinion of some scholars, *Ijtihad* was usually broader than *ra’yi* as it included the consideration of other tools or sources of law. See, Yasin Dutton, *The Origins of Islamic Law: The Qur’an, the Muwatta’, and Medinan Amal*, p.34; cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.4. For a brief and interesting discussion of the context and approaches of the two “groups”, see also Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.63-64.

Justice cannot be served by the formal application of laws regardless of circumstances and contexts. It is the Jurist who is responsible for assessing the circumstances and deciding whether or not there is a need to make an exception to the law. As agreed upon by all Schools of Jurisprudence, the jurist's knowledge of what objectives (*maqasid*) the laws are expected to achieve and in what circumstances or contexts these apply, is what qualifies the jurist to know when there is the need for an exception to the formal application of the law or not. Consequently, the mechanical application of the law can never be a substitute for the sound personal judgement and contextual receptivity of the jurist.

Each of the following 3 reason-based legal instruments – juristic preference/discretion (*istihsan*), “blocking the means”/preclusion (*saddal-dhara'i*), and the unstated good (*al-masalih al-mursalah*) – is used by the jurist to qualify standard precepts, draw exceptions to them, and make unprecedented additions. Al-Qarafi refers to them as “modes of inference” (*istidlal*) to distinguish them from analogical reasoning (*qiyas*) which involves specific application of formal text.¹⁷⁷

Each of these 3 methods of inference has distinctive properties distinguishing it from others as used within a particular School of Jurisprudence (*madhhab*). There is however, significant overlap in their definitions when compared with their usage in other schools. They sometimes function with such independent authority as to take priority over strict analogical deductions or direct applications of standards, and well-established precepts (or rules). This is especially true whenever the conclusions of such analogies and standard rulings become harmful or otherwise inappropriate due to exceptional circumstances.¹⁷⁸

Some scholars have referred to these inferential legal instruments as “**safety-net principles**” in that their principal role is ultimately to protect the objectives (*maqasid*) of the Qur'an and Sunnah - accruing benefits (*maslahah*) and preventing harm (*mafsadah*) – when the application of other tools would appear to fail in this regard. This is also predicated on the juristic conviction

¹⁷⁷ It should be borne in mind, that other tools or legal instruments of *ijtihad* that are concerned with realising and protecting the general good (*maslahah*) or objectives (*maqasid*) of Shari'ah include analogy (*qiyas*), presumption of continuity (*istishab*) and local custom ('*Urf*) as discussed elsewhere in this material.

¹⁷⁸ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.157-158.

that broad standard rules constitute guidelines that must sometimes be qualified, restricted, or suspended under special circumstances to meet the broader purposes for which they were legislated. Such exceptions do not infringe upon the integrity of the standard precepts and rules, but bring to light the proper scope of their legal applications and elucidate their ultimate purpose. In other words, they help define the general rules and prevent their inappropriate application. They have been described as “subsidiary rules of law”.

The focus of these instruments is never on the letter of the law but on its overall purpose as regards specific situations, and they are applied in a systematic manner according to each School’s methodology. Such instruments of inference (*istidlal*) carry the implication that God instituted His laws for the well-being (*maslahah*) of society and individuals. In other words, human beings were not made for the law. The law was made for human beings.¹⁷⁹

For the jurist to follow his conscience in the analysis of such matters is not arbitrary, indiscriminate, or subjective, but constitutes prudent and informed judgment based on profound meditation of the law in its totality. It is an attempt to discover the rationale of utility or benefit (*maslahah*), which is believed to be the spirit that informs the entire juridical system. This role of reasoning is what some scholars and schools are not comfortable about, hence their objection to the authority or validity of all or some of the reason-based instruments of *istidlal* – which some regarded as essentially arbitrary.¹⁸⁰

There was therefore a concern that the apparently abstract nature of the “unstated good” (*al-masalih al-mursalah*) might allow the law to be manipulated to undercut the purposes (*maqasid*) of the law and introduce detrimental innovations.¹⁸¹

¹⁷⁹ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.159.

¹⁸⁰ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.159.

¹⁸¹ Ibn Rushd, *Bidayat al-Mujtahid*, 2:28 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.177.

To minimize this danger, jurists set down various stipulations for the application of the “unstated good” from as early as the time of Imam Malik.¹⁸²

For example, some scholars would first consider the degree of immediate need (*hajah*) or necessity or “point of suitability” and “appropriateness” (*tanasub*) required before principles of inference (*istidlal*) – such as the unstated good, preclusion, etc. – may be resorted to.¹⁸³

They also did not regard rulings based on inferential (*istidlal*) “safety-net principles” of discretion (*istihsan*), preclusion (*sadd al-dhara’i*) and unstated good (*al-masalih al-mursalah*) as having intrinsic permanence like other well-established principles and sources of Islamic law.

In Al-Qarafi’s explanation of this lack of permanence or fixity in inferential rulings, he asserts that precepts, judgments, and rulings of the law fall into 2 categories:

- 1) Those that are ends in themselves (*maqasid*), and
- 2) Those that are means to ends (*wasail*).

Rulings based on unstated good (*al-masalih al-mursalah*) for example, pertain exclusively to means (*wasail*) and are legally valid only as long as they continue to secure the ends (*maqasid*) for which they were originally legislated.¹⁸⁴

As mentioned earlier, “all forms of *ijtihad* are actually aimed at conformity with the sources and objectives of Shari’ah, either explicitly or implicitly. Therefore, the controversy over the question of *istihsan* and *al-masalih al-mursalah* is due to the different terminologies used. As a concept, there is no substantial disagreement among jurists, and the consideration of public interests has been applied by all parties.”¹⁸⁵

¹⁸² See Al-Shatibi, *I’tisam*, 2:311-314, 283-287, 307-312 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.177.

¹⁸³ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.178

¹⁸⁴ Al-Qarafi, *Al-Dhakhira* (Cairo), 1:143-146; Ibn Rushd, *Bidayat al-Mujtahid*, 1:162 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.178.

¹⁸⁵ Wan Azhar Wan Ahmad, *Public Interests (Al-Masalih Al-Mursalah) in Islamic Jurisprudence: An Analysis of the Concept in the Shafi’i School*, ISTAC & IIUM, Kuala Lumpur, Malaysia, 2003, p.135

DISCUSSION QUESTIONS:

1. Explain what you understand by the term “Safety-net Principles”. In what ways are these principles or tools of *ijtihad* similar to a “safety-net”?
2. What are the major “Safety-net Principles”? What are other terms for some of these same tools?
3. Why could the “Safety-net Principles” also be referred to as “*Maqasid* Principles”?
4. Why do you think some scholars would describe *Qiyas*, *Istishab*, and the “Safety-net Principles” as “methodological procedures” and not as “sources” of Shari’ah?
5. When considering the “Safety-net Principles”, why is the letter of the law not regarded as important as “the overall purpose as regards specific situations and applied in a systematic manner according to each School’s methodology”?
6. In what way would you agree or disagree with the following statement: “human beings were not made for the law. The law was made for human beings!”
7. Discuss some measures taken by jurists to ensure that the “Safety-net Principles” are not manipulated to undercut the purposes (*maqasid*) of the law and introduce detrimental innovations.
8. In what ways do the “Safety-net Principles” lack the intrinsic permanence or fixity unlike other well-established principles and sources of Islamic law?

LESSON 20: COMPARING THE SCHOOLS OF JURISPRUDENCE

Table of the hierarchy of sources and tools used by the various Schools of Juristic Thought

	HANAFI	MALIKI	SHAFI'I	HANBALI	ZAHIRI	JA'FARI & ZAIIDI	MU'TAZILA	'IBADI
1	QUR'AN	QUR'AN	QUR'AN	QUR'AN	QUR'AN	QUR'AN	QUR'AN	QUR'AN
2	SUNNAH MUTAWATIRA				SUNNAH (MUTAWATIRA & AHAD)		SUNNAH MUTAWATIRA	SUNNAH (MUTAWATIRA & AHAD)
3	Juristic preference (<i>Istihsan</i>)	Early Madinah's Tradition (<i>Amal ahl al-Madinah</i>) / Consensus (<i>Ijma'</i>)	Consensus of Companions (<i>Ijma' al-Sahabah</i>)	Single-chained Hadith (<i>Hadith Ahad</i>)	Presumption of Continuity (<i>Istishab</i>)	<i>Ijma' al-Itrah</i> (Ahl al-Bayt)	Single-chained Hadith (<i>Hadith Ahad</i>)	Consensus (<i>Ijma'</i>)
4	Analogy (<i>Qiyas</i>)	Public Interest (<i>Maslahah</i>) / Juristic preference (<i>Istihsan</i>)	Analogy (<i>Qiyas</i>) – according to later Shafi'is	Companion's opinion (<i>Qawl al-Sahabi</i>)		Companion's opinion (<i>Qawl al-Sahabi</i>)	Consensus (<i>Ijma'</i>)	Analogy (<i>Qiyas</i>)
5	Consensus (<i>Ijma'</i>)	Analogy (<i>Qiyas</i>)	Single-chained Hadith (<i>Hadith Ahad</i>)	Consensus of others (<i>Ijma'</i>)			Analogy (<i>Qiyas</i>)	Presumption of Continuity (<i>Istishab</i>)
6	Single-chained Hadith (<i>Hadith Ahad</i>)	Single-chained Hadith (<i>Hadith Ahad</i>)	Companion's opinion (<i>Qawl al-Sahabi</i>)	Analogy (<i>Qiyas</i>)			Public Interest (<i>Maslahah</i>)	Juristic preference (<i>Istihsan</i>)
7	Companion's opinion (<i>Qawl al-Sahabi</i>)	Companion's opinion (<i>Qawl al-Sahabi</i>)	Presumption of Continuity (<i>Istishab</i>)	Public Interest (<i>Maslahah</i>)			Juristic preference (<i>Istihsan</i>)	Public Interest (<i>Maslahah</i>)
8	Custom (' <i>Urf</i>)	Blocking the means (<i>Sadd al-dhara'i</i>)		Juristic preference (<i>Istihsan</i>)				
9	Presumption of Continuity (<i>Istishab</i>)	Custom (' <i>Urf</i>)		Blocking the means (<i>Sadd al-dhara'i</i>)				
10		Presumption of Continuity (<i>Istishab</i>)		Presumption of Continuity (<i>Istishab</i>)				

Sources and tools rejected by the various Schools of Juristic Thought:

	HANAFI	MALIKI	SHAFI'I	HANBALI	ZAHIRI	JA'FARI & ZAIDI	MU'TAZILA	'IBADI
1	Early Madinah's Tradition (<i>Amalahl al-Madinah</i>)		Early Madinah's Tradition (<i>Amalahl al-Madinah</i>)	Early Madinah's Tradition (<i>Amalahl al-Madinah</i>)	Early Madinah's Tradition (<i>Amalahl al-Madinah</i>)	Analogy (<i>Qiyas</i>)	Companion's opinion (<i>Qawl al-Sahabi</i>)	Custom (' <i>Urf</i>)
2	Public Interest (<i>Maslahah</i>)		Public Interest (<i>Maslahah</i>)	Custom (' <i>Urf</i>)	Public Interest (<i>Maslahah</i>)	<i>Ijma'</i> of Companions	Custom (' <i>Urf</i>)	Blocking the means (<i>Sadd al-dhara'i</i>)
3	Blocking the means (<i>Sadd al-dhara'i</i>)		Blocking the means (<i>Sadd al-dhara'i</i>)		Blocking the means (<i>Sadd al-dhara'i</i>)	<i>Amalahl al-Madinah</i>	Blocking the means (<i>Sadd al-dhara'i</i>)	Early Madinah's Tradition (<i>Amal ahl al-Madinah</i>)
4			Custom (' <i>Urf</i>)		Juristic preference (<i>Istihsan</i>)	Public Interest (<i>Maslahah</i>)	Early Madinah's Tradition (<i>Amal ahl al-Madinah</i>)	Companion's opinion (<i>Qawl al-Sahabi</i>)
5			Juristic preference (<i>Istihsan</i>)		Custom (' <i>Urf</i>)	Blocking the means (<i>Sadd al-dhara'i</i>)	Presumption of Continuity (<i>Istishab</i>)	
6					Consensus (<i>Ijma'</i>)	Companion's opinion (<i>Qawl al-Sahabi</i>)		
7					Analogy (<i>Qiyas</i>)	Custom (' <i>Urf</i>)		
8					Companion's opinion (<i>Qawl al-Sahabi</i>)	Presumption of Continuity (<i>Istishab</i>)		

Source: Da'wah Institute of Nigeria, 2013

NOTE: The diagrams above represents the dominant position of the early Jurists especially as it applies to the Shafi'i and Hanbali Schools. Some fundamental modifications to the methodology of these Schools' tools occurred later in their history as a result of the contributions of some significant scholars such as **Imam al-Juwayni**, **Imam al-Ghazali** and **al-'Izz bin Abdu Salam** in the Shafi'i School and other scholars such as **Ibn Taimiyyah** and **Ibn Qayyim** in the Hanbali School.

While the content of the tables above may represent a particular School of Juristic Thought (*Madhhab*), it does not capture the nuances and diversity of opinions within each School. Two

non-Sunni Schools of Juristic Thought have also been listed in the comparison. The majority of Sunni scholars give no regard to the ideological (*aqidah*) and juristic (*fiqhi*) positions of other non-Sunni sects of Islam, as they consider them as not being representative of the correct practice of the Prophet (ﷺ) and the majority of his greatest Companions. The four major Sunni Schools of Juristic Thought (*madhhabs*) are the Hanafi, Maliki, Shafi'i, and Hanbali Schools.

The foundational juristic principles (*usul al-fiqh*) of the non-Sunni Schools are presented here purely for the academic purpose of highlighting the key similarities and differences in their approaches and methodologies. It is not the purpose of this work to delve into the other areas of similarities or differences, or why the Sunni Schools are regarded as more authoritative.

An increasing number of contemporary scholars in each School are giving more credence and authority to those tools of *Ijtihad* that are related to the attainment of the objectives (*Maqasid*) of *Shari'ah*, especially after the contributions to *Usul al-Fiqh* by **Abu Ishaq al-Shatibi** in his *Muwafaqat*¹⁸⁶

SOME POINTS OF REFLECTIONS ON THE SCHOOLS AND THEIR METHODOLOGIES

- No school of Islamic law is more textual than the Hanbali School in its attempt to find narrative precedents for legal rulings including post-Prophetic (*athar*) reports. The use of other sources of law was often only a last resort. "The Hanbali School stands alone alongside the Maliki in its formal endorsement of (juristic) discretion (*istihsan*), preclusion (*sadd al-dhara'i*), and unstated good (*masalih al-mursalah*), even if it narrows their scope."¹⁸⁷
- "Malik and Abu Hanifa were circumspect regarding solitary (*ahad*) hadith whenever they regarded their legal implications to be irregular (*shadhdh*) in terms of the normative precepts and principles of the law. They required that soundly transmitted solitary hadith

¹⁸⁶ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.20-21

¹⁸⁷ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.97-98.

be corroborated by other sources of law before their content could be validated as constituting legal norms. This was their way of “maximizing certainty”. For the Maliki School, the Medinan praxis (*‘Amal*) was the chief criterion against which solitary hadith – like other legal texts – were evaluated.” It therefore provided a way for overcoming the epistemological uncertainties (regarding the understanding of the meaning and implications) of single-transmitted reports.¹⁸⁸

- Imam Al-Shafi’i “did not deny the element of conjecture (*zanni*) implicit in solitary hadith. He acknowledged that there were epistemological problems associated with legal arguments based on solitary hadith, but regarded such problems as secondary when compared to the divine imperative to follow the Prophetic command”. This Qur’anic injunction to follow the Prophet (ﷺ) was “understood to imply an adherence to the overt meanings of authentic solitary hadith transmissions regardless of the implications of their content as gauged against the broader principles and precepts of the law in its normative sources.”¹⁸⁹

DISCUSSION QUESTIONS:

¹⁸⁸ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.112-113.

¹⁸⁹ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.113.

1. In hierarchical order, list the first 5 or 7 sources/tools of *Shari'ah* used by each of the following schools of Juristic Thought:
 - a) Hanafi
 - b) Maliki
 - c) Shafi'i
 - d) Hanbali
 - e) Zahiri
 - f) Ja'fari/Zaidi
2. Discuss some contemporary examples of convergence and "mixing of opinions" (*talfiq*) between various Schools based on their concern for *Maqasid*, and what tools of *ijtihad* would be used to justify this (*talfiq*).
3. In what ways would you describe the various "secondary sources" or tools of *ijtihad* regarded as differing methods of getting closer to or capturing the *Sunnah* in new or uncertain situations?

LESSON 21: LET'S REVIEW!

DISCUSSION QUESTIONS:

Find a partner to discuss the following:

1. Explain and give one example of a ruling that is based on each of the following secondary sources of evidence of *Shari'ah*:
 - a. *Ijma'*
 - b. *Qiyas*
 - c. *Ra'i al-Sahabi*
 - d. *Maslahah*
 - e. *Istihsan*
 - f. *Saddal-Dhara'i*
 - g. *'Urf*
 - h. *Istishab*
 - i. *AmalAhl al-Madinah*
2. How are *Istihsan* and *Maslahah* similar, and how do they differ?

SECTION 3: IN SEARCH OF CERTAINTY

LESSON 22: *FIQH* AND *SHARI'AH* – ANY DIFFERENCE?

Though the terms *Fiqh* and *Shari'ah* are often used interchangeably, and their meanings may overlap depending on a particular scholar's definition or perspective, there are some significant differences in their definitions and implications that need to be emphasised.¹⁹⁰

In the search for certainty regarding the will of Allah, it is important to distinguish *Shari'ah* from *Fiqh*, so as to make clearer the line between the **immutable, eternal divine guidance** of Allah (the Lawgiver, *Shari'*) through His Prophet (ﷺ) (referred to as the *Shari'ah*), and the **fallible, mutable, human attempts to extract laws** from that divine source (referred to as *Fiqh*) and carried by a jurist (*Faqih*).

This distinction makes it possible and therefore legitimate to review, renew (*islah/tajdid*), and, where necessary, challenge *Fiqh* and *fatwas*, while remaining cognizant of and loyal to those injunctions that are clearly from the *Shari'ah*. The distinction also emphasizes the need for scholars and students to be more cautious of mistakenly speaking in God's name especially in the subject of *Fiqh* (jurisprudence and laws) or so-called "*Shari'ah* Laws". The absence of a clear distinction between the two terms has regrettably also led to accusations of apostasy and heresy on issues that are related to fallible *ijtihad* and *fiqh*.

Detailed differences between the *Shari'ah* and *Fiqh* are as follows:

1. *Shari'ah* is the body of revealed injunctions found both in the *Qur'an* and *Sunnah* and it includes the following three main components: *al-ahkam al-i'tiqadiyyah* or *aqidah* (the sanctions/values relating to beliefs), *al-ahkam al-akhlaqiyyah* (the sanctions/values relating to moral and ethics) and *al-ahkam al-amaliyyah* (sanctions/values relating to worship and acts of devotion, along with the mundane sayings and doings of the individuals and his relations with others). *Al-ahkam al-amaliyyah* is also called *Fiqh*. From this perspective, *Fiqh* is one component of the *Shari'ah*.

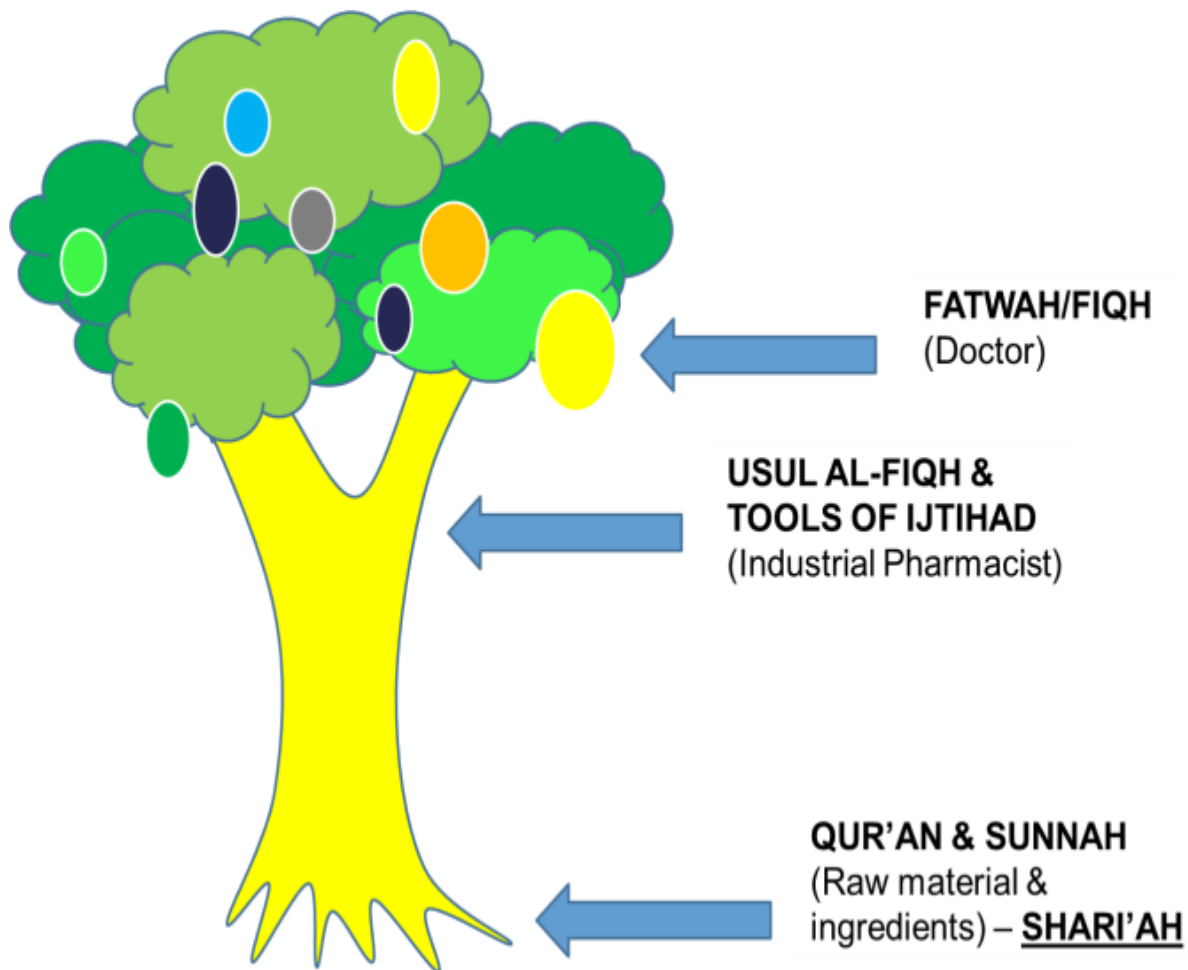
¹⁹⁰ Laldin, Mohammad Akram, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.8; Mohammad Omar Farooq, *Towards Our Reformation: From Legalism to Value Oriented Islamic Law and Jurisprudence*, London, 2011, p.17-19; Kemal A. Faruki, *Islamic Jurisprudence*, Adams Publishers, Delhi, 1994, p.12-19; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.59-60.

2. *Shari'ah* may be envisaged as a wide circle including all human actions, but *Fiqh* is a narrower circle, confined to what are commonly understood as human actions which have legal implications.
3. *Shari'ah* is fixed and unchangeable, whereas certain rulings of *Fiqh* change according to changes of the circumstances under which they are applied.
4. The *Shari'ah* is contained within revelations in which knowledge may only be obtained from the *Qur'an* or *Sunnah*. In *Fiqh*, the power of reasoning (*ijtihad*) is stressed, and deductions based upon knowledge are continuously referred to with approval.¹⁹¹

Within the Islamic Sciences (*Ulum al-Deen*) there are many specialists. The most important of these are the *Mufasssirun* (who specialize in the sciences and commentaries of the *Qur'an*), *Muhaddithun* (who specialize in the Sciences, authenticity and commentaries of Hadith literature), and the *Fuqaha* (who specialize in law and jurisprudence). Less well-known but no less important are the *Usuliyyun*, *Mujtahidun* and *Muftis*. The *Usuliyyun* are concerned with the fundamental principles, protocols, procedures and methodologies of using evidence and proofs (*adillah*) from the *Qur'an*, *Sunnah*, *Ijma'*, *Qiyas*, *Maslahah*, *Sadd al-Dhara'i*, and the other tools and principles of *ijtihad*. Those qualified to use the tools of the *Usuliyyun* to derive rulings representative of the Prophet (ﷺ) are known as *Mujtahidun*. A *Mujtahid* who is knowledgeable of his local priorities and realities is usually qualified to become a *Mufti*. These are jurists responsible for performing *ijtihad* for their specific contexts and issuing religious verdicts (*fatwas*) accordingly.

The following diagram shows the relationships between *Shari'ah*, *Usul al-Fiqh* and *Fatwas/Fiqh*:

¹⁹¹ Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.8.



Source: Da'wah Institute of Nigeria, 2013

In the diagram above, the relationship between *Shari'ah* and *Fiqh* is represented by a tree and its parts. The roots in the soil represent the *Shari'ah* and its primary sources of legislation – the Qur'an and *Sunnah*. The trunk and branches represent the tools and methodologies (*Usul al-Fiqh* and *Maqasid*) used by scholars to derive rulings or 'fruit' (*fatwas*) in the realm of Jurisprudence (*Fiqh*). To use a pharmaceutical analogy, the primary sources constitute the raw ingredients of a medicine, the methodology and tools are how industrial pharmacists process the raw ingredients into a consumable product, and the resulting medication is dispensed by doctors. The manufactured medicine may at times be out of date or result in adverse side effects which warrant an alternative prescription. In other words, the relevance of a *fatwa* would depend on its quality (or the methodological tools of its extraction), the societal context and its ability to effectively achieve the objectives (*Maqasid*) of *Shari'ah* – of bringing benefit (*maslahah*) or removing harm (*mafsada*).

It should be borne in mind however, that as with other fields of human endeavor, a few scholars could specialize in more than one of the inter-related disciplines of the Islamic Sciences.

DISCUSSION QUESTIONS:

1. Why are the terms “*Fiqh*” and “*Shari’ah*” often confused with each other?
2. Discuss some of the major differences between *fiqh* and *shari’ah*.
3. In what sense would you describe *Shari’ah* as divine and *Fiqh* as human?
4. Use the metaphor of a fruit tree to describe the differences between *Shari’ah*, *fiqh*, *usul al-fiqh* and *fatwa*.
5. Use the metaphor of some roles of professionals in the healthcare industry to explain the roles and specialization of scholars such as: *Mujtahid*, *Mufasssir*, *Faqih*, *Muhaddith* and *Mufti*, etc.
6. Can you come with another metaphor for describing the roles and specialisations mentioned in No. 5?

LESSON 23: TO SPEAK IN GOD’S NAME

Speaking in God’s name refers to saying something that is attributed to Him and hence giving that information the weight of divine authority. Speaking with the authority of God (i.e. in His name) or in the name of the Prophet (ﷺ) is a weighty responsibility; taking it on without acquiring the qualification to do so has grave consequences. Credentials are not easily acquired and require great intellectual striving over many years and across several fields. Even after an individual has acquired the credentials to issue an opinion, his or her authority can only be accepted if there is sufficient evidence or proofs of certainty that the opinion fairly represents Allah or His Prophet (ﷺ). Indeed, the evidence serves as the authority and not necessarily the individual, though the individual must be qualified to apply that authority.

To contradict the Lawgiver (Allah) or to speak in His name without any authority is an act of *shirk* since such a person is elevating himself to the status of the Lawgiver.¹⁹² Committing *shirk* is considered in Islam as the greatest sin against Allah (Qur’an 4:48; 5:72).

According to **Ibn Taimiyyah** and others, the early Muslims (*Salaf*) and great scholars were very careful in declaring things prohibited (*Haram*) or a religious obligation (*Fard/Wajib*) if they did not have clear and certain evidence to back their conclusions.¹⁹³ The great scholars were also aware that:



Lying about God or about the Prophet (ﷺ) is a great sin – Qur’an 7:33; 2:79. The Prophet said, “Whoever lies against me deliberately has prepared a seat for himself in Hell.”¹⁹⁴



The great scholars of Islamic heritage recognized the importance of distinguishing the divine teachings of the Qur’an and *Sunnah* (*Shari’ah*) from fallible human intellectual

¹⁹² Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam*, Salimiah, 1992, p.21-24

¹⁹³ Cited in Yusuf Al-Qaradawi, *The Lawful and the Prohibited in Islam*, Salimiah, 1992, p.18-21; See also Arif Ali Khan et al., eds., *Encyclopaedia of Islamic Law*, Vol. 3: *Islamic Law in Practice*, Kuala Lumpur: Crescent News(KL) SdnBhd, 2006, p.127-128.

¹⁹⁴ *Sahih al-Bukhari*, no. 1229; *Sahih Muslim*, no. 4; *Sunan Abu Dawud*, no. 3653; *Sunan Ibn Majah*, no. 30; *Sunan al-Tirmidhi* no. 2659; *Sunan Al-Darimi*, no.231; *Shu’ab Al-Iman*, no. 7557; *Sahih Ibn Hibban*, no. 31; *Musnad Imam Ahmad*, no. 3847; *Musnad Al-Bazzar*, no. 970; *Musnad Al-Shihab*, no. 556; *Musnad Al-Tayalisi*, no. 342; *Musannaf Ibn Abi Shaybah*, no. 26239; *Musannaf Abdul-Razzaq*, no. 10445.

efforts at extracting rulings (*istinbat*) and juristic reasoning (*ijtihad*) that produce *Fiqh* and *Fatawa*.¹⁹⁵



Scholars were also afraid of committing heresy or deviant innovations (*bid'ah*) as the Prophet (ﷺ) warned, “...Every innovation is deviance...and leads to hell.”¹⁹⁶



Islam is surrender to Allah's will and not a scholar's will. The Qur'an and *Sunnah* warn against uncritical acceptance and following of the opinions of scholars in matters of religion – Qur'an 9:31.



In order to not equate their own opinion with attempts to ascertain an opinion representative of Allah and His Prophet (ﷺ), they recognized the importance of certainty and avoidance of doubt.¹⁹⁷



It, therefore, was imperative for scholars to find verifiable (and peer-reviewable) ways of distinguishing what was an “absolute truth” from a relative truth in their understanding and application of the Qur'an and *Sunnah* in their various contexts.



All principles, evidences, classifications, tools and methodologies employed by jurists are used with the intent of objectively “maximizing the certainty” with which they believe they best represent the will of God, and the *Sunnah* of the Prophet (ﷺ) in a particular context, and also assessing and articulating the extent of subjectivity or speculation involved.

DISCUSSION QUESTIONS:

¹⁹⁵ Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.8; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.56-60.

¹⁹⁶ Musnad Imam Ahmad, no. 17144; Sunan Abu Dawud, no. 4609; Sahih Ibn Hibban, no.5; Sahih Ibn Khuzaima, no.1785; Abu Abdullah Muhammad bin Abdullah Al-Hakim, *Al-Mustadrak*, Dar Al-Kutub al-Ilmiyyah, 1411 AH, vol.1, p.176, hadith no.332.

¹⁹⁷ Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam*, Salimiah, 1992, p.21-24; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, 194-196.

1. Why are scholars concerned about the certainty for authority to speak in Allah's name?
2. What is wrong or dangerous about speaking in God's name without the prerequisite authority?

LESSON 24: DEGREES OF CERTAINTY IN THE USE OF PROOFS

In any search for the truth, there is a concern for the degree or level of certainty in deciding whether or not the truth on a matter has actually been arrived at. Regarding the certainty that jurists need in order to determine, formulate laws or categorise an action as being *Fard /Wajib* or *Haram* (i.e. to be able to speak in God's name), there is a recognition of the need for a significant degree of certainty concerning both the historical authenticity and credibility of the texts (or proofs/tools used), and also the meaning and implications arrived at from these sources. This in turn affects the rulings or value-judgement (*hukum*) arrived at by the jurist.

Otherwise without a consistent systematic methodology of arriving at greater certainty, there is a real fear of speaking in God's name without the prerequisite authority thereby committing *shirk*, as earlier discussed.

Literally, *dalil* (plural of *adillah*) means proof, indication or evidence. Technically it is an indication in the sources from which a practical rule of *Shari'ah*, or a *hukm* is deduced.¹⁹⁸ The *hukm* so obtained may be definitive (*qat'i*) or it may be speculative (*zanni*) depending on the nature of the subject, clarity of the text, and the value which it seeks to establish.¹⁹⁹

The proofs or evidences of *Shari'ah* (*adillah Shar'iyyah*), and the laws or values (*ahkam*) that regulate the conduct of the responsible adult Muslim (*mukallaf*), are the two principal themes of *Usul al-Fiqh*. Of these two, however, the former (*adillah*) is by far the more important as, according to some ulema, the *ahkam* are derived from the *adillah* and are therefore subsidiary to them.²⁰⁰ In the terminology of *Usul al-Fiqh*, *adillah Shar'iyyah* usually refers to four principal proofs, or sources of the *Shari'ah*, namely the *Qur'an*, *Sunnah*, consensus and analogy. *Dalil* in

¹⁹⁸ Ministry of Awqaf and Religious Affairs, *Al-Mausu'at al-Fiqhiyya al-Kuwaitiyya*, Dar al-Salasil, Kuwait, Vol.21, p.22

¹⁹⁹ Amidi, *Ihkam*, I. 9; Badran, *Usul*, P. 46, Hitu, *Wajiz*, p. 99; cited in in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.19

²⁰⁰ It is, according to Kamali, perhaps in view of the central importance of these two topics to *usul al-fiqh* that al-Amidi defines the latter as the science of the "Proofs of *fiqh* (*adillah al-fiqh*) and the indications that they provide in regard to the *ahkam* of the *Shari'ah*". Amidi, *Ihkam*, I, 7; Badran, *Usul*, P. 36; cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.19

this sense is synonymous with *asl*, hence the four main sources of *Shari'ah* are known both as *adillah* and *usul*.²⁰¹

Basically, jurists were concerned about certainty as it applied to 2 major issues. Firstly, it was about **AUTHENTICITY**; how certain were they that a particular text or proof (*dalil*) was trustworthy and authentic? Secondly, it was certainty regarding the **MEANING AND IMPLICATIONS**; how certain were they that the meaning and implication of that text or proof was correct and true to the will of Allah? If they were absolutely certain about any of these they regarded such texts or proofs and their implications as “definitive” or *Qat'i*. If they were less certain, these were regarded as “speculative”, “presumptively authoritative” or *Zanni*.

1. Authenticity (*thubut* or *wurud*) of the texts of Qur'an and Hadith, etc.

The term “*thubut*” (lit. “firm”) refers to the level of reliability of transmission (*wurud*), and credibility and trustworthiness in the authenticity of the text or proofs (*adillah*). Such a text or “source” may have a level of authenticity that is definitely proven and regarding which there is consensus, definitiveness, categorical authoritativeness and absolute certainty (*Qat'i*). In this case the text or proof is regarded as being “*Qat'i al-Thubut*” or “*Qat'i al-Wurud*” – i.e. “certain or definite authenticity and transmission”. There is a consensus among all Schools that this applies to Qur'an and multiple-chained (*Mutawatir*) Hadith.²⁰² There is no consensus among scholars that this definitiveness or level of credibility and certainty applies to any other of the proofs (or *adillah Shar'iyyah*).

²⁰¹ According to Kamali, “Some *fuqaha* have drawn a distinction between *dalil* and *amarah* (lit. sign or allusion) and apply *dalil* to the kind of evidence which leads to a definitive ruling or that which leads to positive knowledge ('ilm). *Amarah* on the other hand is reserved for evidence or indication which only leads to a speculative ruling. (Al-Amidi, *Al-Ihkam*, vol.1, p.9) In this way, the term '*dalil*' would only apply to the definitive proofs, namely the Qur'an, Sunnah and *ijma'*, and the remaining proofs which comprise a measure of speculation, such as *qiyas* and *istihsan*, etc., would fall under the category of *amarat*.” Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.19-20

²⁰² Abu Muhammad Abdullahi bin Ahmad al-Maqdisi Ibn Qudama, *Raudat al-Nazir wa junta al-Munazir*, Muhammad bn Saud University, Riyadh, 1399AH, p.94; Ibn Najar, Abulbaqai, Muhammad bn Ahmad, *Sharh al-Kaukab al-Munir*, Maktabat al-Ubaikan, 1418AH, Vol.2, p.217

Where the *adillah* are less certain in credibility than these two definitive sources and the level of certainty regarding them is therefore only presumptive, speculative or probable (*zanni*), the proof is regarded as being “*Zanni al-Thubut*” – i.e. “of probable or speculative authenticity” only only “presumptively authoritative”.²⁰³ This is the case with single-chained (*ahad*) *hadith*²⁰⁴, *Ijma*²⁰⁵, *qiyas* and other tools of *ijtihad* or proofs that do not give knowledge of certain authenticity (*ilm al-yaqin*) and are not sources of absolute truths in the view of most jurists. The “Secondary Sources” of law contain a measure of speculation and are all regarded *zanni al-thubut* in their credibility, integrity and reliability.²⁰⁶

While there are differing conditions and degrees of certainty regarding authenticity or credibility of any text or proof (*adillah*), these are the two major categories of concern for the purpose of an introduction to the subject matter – *qat’i al-thubut* and *zanni al-thubut*.

2. Meaning and implications (*dilalah*) of texts of Qur’an and Hadith, etc.

In their search for certainty regarding the correct understanding of the will of God from the Qur’an or from its implementation in the tradition (*Sunnah*) of the Prophet (ﷺ), scholars

²⁰³ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.7

²⁰⁴ As will be discussed more detail in Lesson 25, the solitary or single-chained (*ahad*) *Hadith* is of speculative authenticity and therefore falls under the category of speculative (*zanni*) proofs. See Shawkani, *Irshad*, p. 47; Badran, *Usul*, p. 53; Hitu, *Wajiz*, p. 305 - cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.21. Though the Zahiri School regard *Hadith Ahad* as being *qat’i al-thubut* once it is reliably authentic (*sahih*).

²⁰⁵ According to some scholars, a ruling of *ijma*’ may have reached us by continuous multiple testimony (*tawatur*) in which case they would regard it as definitely proven (*qat’i al-thubut*) and similar to the Maliki “*Amal of Medina*”. But when *ijma*’ is transmitted through solitary reports, its authenticity would be open to doubt and therefore *zanni al-thubut*. See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.21. On the absence of an agreed definition of *Ijma*’ and reasons why others do not regard it as an independent valid proof, see Lesson 9 on *Ijma*’ in this material.

²⁰⁶ According to Kamali, “Some *fuqaha* have drawn a distinction between *dalil* and *amarah* (lit. sign or allusion) and apply *dalil* to the kind of evidence which leads to a definitive ruling or that which leads to positive knowledge (*ilm*). *Amarah* on the other hand is reserved for evidence or indication which only leads to a speculative ruling. (Al-Amidi, *Al-Ihkam*, vol.1, p.9) In this way, the term ‘*dalil*’ would only apply to the definitive proofs, namely the Qur’an, *Sunnah* and *ijma*’, and the remaining proofs which comprise a measure of speculation, such as *qiyas* and *istihsan*, etc., would fall under the category of *amarat*.” See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.19-20.

have also ranked their interpretation of the meanings and implications of the proofs (*adillah*) according to different levels of certainty.

The term “*Dilalah*” refers to the meaning and implication, or what is understood from a text. The meaning and implication (or *dilalah*) of the text may be categorically clear and unambiguous, such that there is consensus and absolute certainty (*Qat’i*) regarding how it is understood. Such a text has only one meaning and admits of no other interpretations. In this case the meaning (*dilalah*) is considered as being “*Qat’i al-Dilalah*” – “certain or definite meaning”. Where the understanding or meaning is less certain and therefore only presumptive, speculative or probable (*zanni*) because other valid alternative interpretations are possible, the meaning is regarded as being “*Zanni al-Dilalah*” – “probable or speculative meaning”. While there are differing conditions and degrees of certainty regarding the meaning and implications of any text or proof (*adillah*), these are the two major categories of concern for now – *qat’i al-dilalah* and *zanni al-dilalah*.

In the discussion of the *qat’i* and *zanni*, the Qur’an and *Sunnah* are seen as complementary and integral to one another. The reason is that the speculative (*zanni*) implication of a text of the Qur’an can be made definitive by the *Sunnah* and vice versa. The *zanni* of the Qur’an may be elevated into *qat’i’* by means of corroborative evidence in the Qur’an itself or in the *Sunnah*. Similarly, the *zanni* of the *Sunnah* may be elevated into *qat’i’* by means of corroborative evidence in the *Sunnah* itself or in the Qur’an. And then the *zanni* of both the Qur’an and *Sunnah* may be elevated into *qat’i* by means of a conclusive *ijma’*, especially the *ijma* of Companions.²⁰⁷

The different conditions required by various Schools and scholars for determining when a text or proof is *zanni* or *qat’i* is sometimes complicated and beyond the scope of this material. Suffice it to say therefore that it is not always self-evident whether a text is *qat’i’* or *zanni* as this too may be open to interpretation.²⁰⁸

²⁰⁷ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.34

²⁰⁸ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.31. A discussion of how exactly various scholars try to resolve apparently conflicting (*ta’arud*) evidences and

Mustapha al-Zarqa asserts that in Maliki jurisprudence, the more conjectural (*zanni*) the precept, legal instruction or “source” is, the more strongly applied the criterion for further qualifying it by reference to the general good (*maslahah*).²⁰⁹ As we shall see later on in this material, the concerns for the real positive or negative consequences of making value-judgements (*hukum*) and of their verdicts for specific contexts (*fatwas*) affect the final conclusions of scholars on various issues.

DISCUSSION QUESTIONS:

1. How did scholars try to determine the difference between what they were absolutely and relatively certain about regarding the will of Allah in their formulations of Islamic jurisprudence?

proofs (*adillah*) is beyond the scope of this material. Those interested in this broad and complicated field may consult any of the major references of *Usul al-Fiqh* cited in this material.

²⁰⁹ Cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.92-93.

LESSON 25: DEGREES OF CERTAINTY IN AUTHENTICITY OF TEXTS

The authenticity of a text (*thubut* or *wurud*) determines the levels of certainty, reliability, trustworthiness and authority that the text or proof is given. The more authentic a text is, the higher its authority. Inauthentic texts have no authority. This may be applied to the primary sources as follows:

1. Qur'an ²¹⁰

The authenticity of the Qur'an is certain and, therefore, gives absolute certainty of truth (*ilm al-yaqeen*). This is an area of consensus among all Muslim scholars and Schools of Juristic Thought. Denial of the authenticity of any text of the Qur'an is regarded as a rejection of faith (*kufr*).

While the text of the Qur'an is absolutely authentic (*qat'i al-thubut*), the meaning and implications of the text may be either absolutely certain (*qat'i al-dilalah*) or speculative and open to alternative interpretations (*zanni al-dilalah*). This is discussed in more detail in Lesson 26.

2. Sunnah ²¹¹

²¹⁰ For further reading on the compilation, preservation and authenticity of the Qur'anic text, see M.M al-Azami, *The History of Qur'anic Text from Revelation to Compilation: A Comparative Study with the Old and New Testaments*, Islamic Academy, Leicester, 2003; Dawah Institute of Nigeria, *Authenticity of the Qur'an*, Islamic Education Trust, Minna, 2008; Hamza M. Njozi, *Sources of the Qur'an*. Saudi Arabia: WAMY, 1991.

²¹¹ For further reading of the authenticity of hadith, see Jonathan A.C. Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World*, Oneworld Publications, Oxford, 2009; M.M. Al-Azami, *Studies in Early Hadith Literature*. Indianapolis, Indiana, USA: American Trust Publications, 1978.

The hadith narrations are the major vehicles that carry the *Sunnah*.²¹² The scholars of the sciences of hadith generally classify the authority and authenticity of the hadith according to 5 major criteria:²¹³

1. The reference to a particular authority (*Qudsi* – sacred; *Marfu'* – elevated; *Mauquf* – stopped; and *Maqtu*–severed);
2. The chains or links of narration (*isnad*) and whether they are interrupted or not (*Musnad* – supported; *Mursal* – hurried; *Muttasil* – continuous; *Munqati'* – broken; *Mu'dal* – perplexing; and *Mu'allaq* – hanging);²¹⁴
3. The nature of the text and the *isnad* (*ZiyadatuThiqah* – addition by a reliable reporter; *Munkar* – denounced; and *Mudraj* – interpolated)

²¹² Except in the Maliki School of juristic Thought where the *Amal Ahl al-Madinah* is viewed as the normative sunnah of the Prophet and his Companions that was meant to be implemented, and Hadith that are not supported by *Amal* are viewed as more irregular instances of ambiguous implications (*shadhdh*). See 'Umar FaruqAbd-Allah, *Malik's Concept of 'Amal in the Light of Maliki Legal Theory*, (unpublished PhD. Thesis), The University of Chicago, Illinois, 1978, p.80; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.103.

Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, 80-86; Jonathan A. C. Brown, *Introduction to Shari'ah and Islamic Jurisprudence*, Oneworld Publications, Oxford, 2009p.67-122; Mohammed Hashim Kamali, *A Textbook of Hadith Studies*, The Islamic Foundation, Leicester, 2005, p.139-175.

²¹⁴ Though not a major concern for discussion in this material, it may be worthy of note to bear in mind that "the distinction between disconnected (*mursal*) and connected (*musnad*) hadith constituted one of the critical fault lines of juristic dissent in the formative and post-formative periods". Imam Al-Shafi'i in particular is noted to have "sought to marginalize disconnected hadith as authoritative sources of law, although their use had been ubiquitous for almost two hundred years before him and remained valid in other Sunni traditions." This eventually contributed to the notion that such hadith were less "sound" and became a basis for the major discrepancies between the Shafi'i and other schools of law. See, Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.98-102. A well-respected Successor of the Companions (*Tabi'*) such as Al-Hassan al-Basri is reported to have said that whenever he heard a hadith from four or more Companions, he would transmit it as a disconnected (*mursal*) hadith, whereas whenever he transmits a hadith from a single Companion whom he cited by name, he heard the hadith from that Companion only. (Abu Zahra, *Malik*, p.296; cited in *ibid*, p.101-102). In other words, in the opinion of some early scholars, a disconnected (*mursal*) hadith did not automatically mean it was less authentic. In fact, depending on who narrated it, it could be more reliable than one narrated by a Companion whose name is explicitly mentioned in the chain of narrators (*isnad*).

4. The reliability and memory of the reporters (*Sahih* – sound; *Hasan* – good; *Da'if* – weak; and *Maudu'* – fabricated or forged)
5. The number of reporters in each stage of the *isnad*, or the number of independent chains (*Mutawatir* – consecutive or multiple-chained; and *Ahad* or *Khabar wahid* – isolated or single chained. The *Ahad* category also include *Mash'hur* – famous; *Aziz* – “strong”/rare; and *Gharib* – strange).

Hadith Mutawatir are those hadith with multiple, independent chains of narrators through the first 3 generations after the Prophet, that are numerous enough to provide an “absolute certainty” of truth. A *Hadith Mutawatir* is one which is reported by such a large number of people that they cannot be expected to all conspire together on a lie. This type of hadith is considered as the most authentic type of *hadith*, and is considered by the majority as being next to or (by a few) on the same level as the Qur'an in terms of historical authenticity.²¹⁵ These hadith are understood to give certainty of authenticity (*qat'i al-thubut* or *qat'i al-wurud*). The teachings of such hadith, when explicitly clear and certain (*qati' al-dilalah*) are regarded as “essential to Islam”, and their rejection implies disbelief (*kufr*)²¹⁶ in the opinion of the majority of scholars.²¹⁷

Mutawatir could be based on “multiple chains with the same wording” (*Mutawatir bi al-lafz*) or multiple chains with differing wording that show that a particular action was done or approved of by the Prophet (ﷺ). This latter form is referred to as *Mutawatir bi al-ma'na* (“multiple-chained of the same meaning”) and most *Hadith Mutawatir* belong to this category.

²¹⁵ Muhyiddin Al-Nawawi, *Al-Taqrīb wa al-Taysir*, p.19 (Maktabah al-Shamila); Abdulrahman bin Abubakr al-Suyuti, *Tadrib al-Rawi*, Maktabat al-Riyadh al-Hadithah, Riyadh, vol.2, p.176; Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.84; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.93-95.

²¹⁶ Al-Suyuti, *Miftah al-Jannah*, Madina, 1399 AH, p.5

²¹⁷ It may be worth bearing in mind that some groups among the *Khawarij* at the time of the Sahabah rejected all hadith as they believed in following the Qur'an only. They were regarded as misguided innovators in the religion but still considered to be Muslims. Some respected Companions such as Abdullah bin 'Umar even prayed (*salat*) behind Najda al-Haruri, who was one of the leaders of the *Khawarij*. For details and more examples, see Ibn Taymiyyah, *Minjah al-Sunnah*, Mu'assasat Qurtuba, 1406AH, vol.5, p.247; Hibbatullah al-lalikai, *Sharh Usul I'tiqad Ahl al-Sunnah*, Dar al-Tayba, 1402AH, vol.1, p.154; no.314; Alhassan bin Ali Al-Barbahari, *Sharh al-Sunnah*, Dar Ibn Qayyim, K.S.A., 1408AH, p.57; Imam al-Tahawi, *al-'Aqidah al-Tahawiyyah*, p.45.

The “multiple chains with the same wording” (*Mutawatir bi al-lafz*) are comparatively very few in number. Some have estimated that this type of *mutawatir* may amount to only a few dozen hadith. The majority of *hadith mutawatir* belong to the second category (“multiple-chained of the same meaning/implication but different wordings” - *Mutawatir bi al-ma’na*) and cover mainly those actions on which nearly all Muslim groups and sects agree such as the number of raka’ats in prayers, their approximate timing, fundamental rites of fasting and hajj, etc. that are not explicitly clear from the Qur’an.²¹⁸

A ***Hadith Ahad*** is one which is narrated by people whose number does not reach that of the *Mutawatir*.²¹⁹ Scholars differ on exactly how many chains are needed to qualify a hadith as *Mutawatir*. Some say as few as 4, while others require up to 70.²²⁰

Hadith *Ahad* could be of 3 types based on the number of independent chains of narrators - *Mash-hur*, *Aziz* or *Gharib*. A “famous”, “well-known” or “popular” (*mash-hur*) hadith is one reported by 3 or more narrators at every stage in the chain (*isnad*). A scarce/rare but “strong” (*aziz*) hadith is one reported by only 2 narrators at any stage in the chain. A “strange” (*gharib*) hadith is one where there is only one narrator reporting it at some stage of the chain during the first 3 generations.²²¹ Among *Hadith Ahad* therefore, a hadith that was *Mash-hur* was more authoritative than one that was *Aziz*. The lone-narrator (*Gharib*) hadith from among the *Ahad* category was the least authoritative among the authentic or sound (*Sahih*) hadith narrations.²²²

²¹⁸ See Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.84-88; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Cambridge, 2003, p.93-95.

²¹⁹ For a very enlightening and detailed discussion of the various views regarding the importance, authority and use of authentic single-chained or solitary (hadith *ahad*) among different Schools of Jurisprudence and scholars, see Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.107-129.

²²⁰ Jonathan A. C. Brown, *Hadith: Muhammad’s Legacy in the Medieval and Modern World*, Oneworld Publications, Oxford, 2009, p.104; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 91-97.

²²¹ Muhammad bn Abdulrahman al-Sakhawi, *Al-Tawdih al-Abhur li Tadhkirah Ibn al-Mulaqqan, Fi ‘Ilm al-Athar*, Maktabat Adwa’ al-Salaf, 1418H, p.49; Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.84-85; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.93-108.

²²² For more details on this subject, see Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA Publications, UK, 2006, p.111-140; Jonathan A. C. Brown, *Hadith: Muhammad’s Legacy in the Medieval and Modern World*, Oneworld Publications, Oxford, 2009, p.153-155; See also

Hadith Ahad provide evidence that is not as certain and authoritative as *Mutawatir*.²²³ They do not provide *ilm al-yaqeen* (certainty of truth) but do offer some probability or presumptive authority (*zann*).²²⁴ Hence, the majority of Schools of Juristic Thought and scholars do not regard them as authoritative enough for the purpose of establishing fundamental beliefs (*aqidah*) since these require absolute certainty of knowledge and cannot be based on conjecture, whether speculative, probabilistic or presumptive. This position is supported by the Qur'an which firmly asserts, "Verily, conjecture avails nothing against the truth"(53:28).²²⁵ Consequently, a *Hadith Ahad* also cannot "abrogate" the Qur'an²²⁶ and may not, on their own be used as a basis of declaring someone to be a disbeliever (*kufr*) if he or she does not accept it.²²⁷

<http://islamicperspectives.com/SingleNarrator.htm> (accessed in June 2012) for a discussion on the concerns some scholars have raised about lone-narrator (*gharib*) hadith. The 5 main arguments presented for the view that *Gharib* hadith are acceptable but not legally binding include, (i) Evidence that *sahih isnad* (that is, an *isnad* that reaches the Prophet without interruption and that consists of trustworthy narrators) does not on its own guarantee the authenticity of a hadith, as there could be other doubt-creating factors; (ii) Arguments showing that supplementing soundness of *isnad* by other conditions does not make the acceptance of a *gharib* hadith binding; (iii) Arguments from the Qur'anic requirement of at least two witnesses in important matters; (iv) Argument from examples showing that the Prophet, Companions and Successors did not always accept a *khbar* (report) from a single trustworthy narrator; and (v) Argument that examples of acceptance by the Companions of a *khbar* from only one narrator prove only the permissibility and NOT the obligation of accepting such reports. See also "Islamic Law and the Use and Abuse of Hadith" in Mohammad Omar Farooq, *Towards Our Reformation: From Legalism to Value Oriented Islamic Law and Jurisprudence*, London, 2011, p.94-140.

²²³ Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA Publications, UK, 2006, p.116-119; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.93-98, 482.

²²⁴ See Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA Publications, UK, 2006, p.116-119; Jonathan A. C. Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World*, Oneworld Publications, Oxford, 2009, p.153-155, 173-183.

²²⁵ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.97-98.

²²⁶ In the Hanafi School of Juristic Thought, *hadith ahad* could also not qualify (*takhsis*) the Qur'an. See Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.101-102.

²²⁷ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.97, 105; Some scholars however, such as Ahmad bin Hanbal, Ibn Hazm, Ibn Taimiyyah, Ibn Qayyim, Ibn Abdul-Barr, Shawkani, Albani and some others regard single-chained hadith as reliable enough to be used to establish *Aqidah* (creed), especially if it is supported by some other evidence such as *ijma'*. This in some instances has led some young Muslims to do *takfir* (accusation of disbelief or *Kufr*) about members of most Schools of Juristic Thought that do not give such importance to single-chained hadith on matters of creed. In this regard, see the

The distinction between *Hadith Mutawatir* and *Hadith Ahad* has implications on the authenticity of the hadith, and therefore the authority it holds to determine law. For most scholars of the sciences of hadith, the classification into *Mutawatir* and *Ahad* was purely academic. Since such scholars are not concerned with the determination of law, a hadith was considered authentic if it was confirmed *Sahih* (sound or reliable and authentic) even if it had only one single chain of narrators and even if it conflicted with other proofs (*adillah*) or “secondary sources” law. For jurists or scholars of *Usul al-Fiqh* and *Mujtahid Imams (Usuliyyun)*, however, who dealt with other forms of evidence (such as *Ijma’*, *Qiyas*, *Amal* of Madinah, *Istihsan*, etc.), the number of independent chains of a hadith significantly affected the level of certainty and reliability of a hadith and its authority especially when it conflicted with (or was not corroborated by) other evidence or “sources” of law (*adillah*).

As mentioned earlier on, “All the early schools acknowledged the authority of the sunna but differed widely regarding the methods they used to determine what its content was and how it should be determined.”²²⁸

The majority of jurists, however, agree that *Hadith Ahad* may establish a rule of law, provided that it is related by a reliable narrator and the contents of the report are not repugnant to sound reason.²²⁹ Most scholars have held that *Hadith Ahad* engender speculative (*zanni*) knowledge. They however have differed on the legal implications of acting upon them – whether it is obligatory (*fard/wajib*), recommended (*mustahab*) or merely permissible (*mubah*). In the event that other supporting evidence can be found in its favour or if there is nothing to oppose its contents, then the majority regard acting upon a *Hadith Ahad* as obligatory.²³⁰

detailed discussion by Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA Publications, UK 2006, p.131-133; See also Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.96-108 for conditions scholars placed for the acceptance of *hadith ahad*.

²²⁸ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.97.

²²⁹ Ibn Qayyim al-Jawziyyah, *Al-Manar al-Munif fi al-Sahih wa al-Da’if*, Maktabat al-Matbu’aat al-Islamiyyah, Syria, 1983, p.68; Abdulrahman bin Ali Ibn Jawziy, *Al-Mawdu’at*, 1966, vol.1, p.106, al-Maktabah al-Shamilah; Amidi, *al-Ihkam*, vol.I, p.161; Mahmassani, *Falsafah*, p.74. Cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.97; Israr Ahmad Khan, *Authentication Of Hadith: Redefining The Criteria*, IIIT, 2010

²³⁰ Al-Shawkani, *Irshad al-Fuhul Ila Tahqiq al-Haq min ‘Ilm al-Usul*, p. 47; Abu Zahrah, *Usul al-Fiqh*, p.85. Cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.97.

The authentic or “soundly transmitted connected solitary hadith (*hadith al-ahad al-musnad al-sahih*) was the crux of contention between the Shafi’i and the jurists of the formative and post-formative Maliki and Hanafi traditions.”²³¹

The authority of *Hadith Ahad* among *Mujtahid* Imams (Distinguished Jurists) and their Schools of Juristic Thought ²³²

When discussing the position of any school of juristic thought, it should be noted that there are usually differences of opinion even within each school, and what is presented by various authors as the “opinion of a school” is often only a representation of the dominant or majority opinion in that particular school. In other words, there are often overlapping opinions or positions between the various schools of jurisprudence and among some of their scholars. The following list contains prevailing or dominant opinions about the authority of *Hadith Ahad* in each of the major Sunni schools of juristic thought:

- **Hanafi School** – A *Hadith Ahad* with no other supporting evidence only makes a thing *wajib* or *makruh tahrimi* but not *fard* or *haram*.²³³ In the Hanafi School, a *Hadith Ahad* cannot qualify (*takhsis*) the Qur’an.²³⁴

For more on the differences over the authority of *Hadith Ahad* among *Mujtahid* Imams and their Schools of Juristic Thought (*madhhabs*), see Lesson 33 of this manual.

²³¹ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.107-108.

²³² Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.100-108; Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA, 2006, p.116-118; Jonathan A. C. Brown, *Hadith: Muhammad’s Legacy in the Medieval and Modern World*, Oneworld Publications, Oxford, 2009, p.153-155; Jasser Auda, *Maqasid al-Shari’ah as Philosophy of Islamic Law*, IIIT, London, 2008,, p.101-102, 132-135;

²³³ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 414 and 427.

²³⁴ Jonathan A. C. Brown, *Hadith: Muhammad’s Legacy in the Medieval and Modern World*, Oneworld Publications, Oxford, 2009, p. 154; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 103.

- **Maliki School** – An *Ahad* narration with no other supporting evidence is regarded as ‘irregular’ (*shadhdh*) and only makes a thing *makruh* or *mustahab*.²³⁵ It can make a thing *haram* or *fard* if it is supported by the *Amal* of Madinah or *Qiyas*, etc.²³⁶ Imam Malik used to exercise great caution towards isolated hadith that have irregular and unusual (*shadhdh*) meanings and implications.²³⁷
- **Shafi’i and Hanbali Schools** – A *Hadith Ahad* on its own can make a thing *Fard/Wajib* or *Haram*.²³⁸
- For most Schools of Juristic Thought (Hanafi, Maliki, Shafi’i, and most of the Hanbali), but not the **Zahiri School**, the *Hadith Ahad* on their own cannot be used to establish essential creed (*aqidah*), due to the element of speculation (*zann*) in them.²³⁹

According to Umar F. Abd-Allah, later Maliki jurists often interpreted their school’s position after a more textually referential type of reasoning which held that solitary (*ahad*) hadiths may provide authoritative legal knowledge if they are congruent with and supported by other sources (or *adillah*) and principles of law, one of which would be Medinan praxis (*‘Amal*).²⁴⁰ Later Maliki scholars, such as **Qadi ‘Iyad** consider a *Hadith Ahad* that does not conflict with *Amal* of Madinah as binding.²⁴¹

²³⁵ Shatibi, *al-Muwafaqat fi Usul al-Ahkam*, vol.3, p.37, 64- 76, and 187, cited in ‘Umar Faruq ‘Abd-Allah, *Malik’s Concept of ‘Amal in the Light of Maliki Legal Theory*, (unpublished PhD. Thesis), The University of Chicago, Illinois, 1978, p. 509-514.

²³⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 103.

²³⁷ See ‘Umar Faruq ‘Abd-Allah, *Malik’s Concept of ‘Amal in the Light of Maliki Legal Theory*, (unpublished PhD. Thesis), The University of Chicago, Illinois, 1978, p. 80.

²³⁸ Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA, 2006, p.113-114.

²³⁹ “Ibn Taymiyyah quotes Ibn Abd al-Barr’s summary...: ‘The majority said that it (the lone-narrator or *ahad* hadith) dictates action, not certainty, and it is the opinion of al-Shafi’i and the majority of the jurists.’ Ibn Taymiyyah adds: ‘The lone-narrator report makes action obligatory and is most likely true, short of certainty, according to the majority.’ He cites al-Juwayni and Ibn al-Baqillani in support of this opinion.” Cited in Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA, 2006, p.118.

²⁴⁰ Qadi Iyad, *Tartib*, 1:17; Al-Qarafi, *Al-Dhakhira* (Cairo), 1:33; Ibn Al-Hajib, *Mukhtasar*, 72; Ibn Tumart, *A’azz*, 51-52; Abu Zahra, *Malik*, 303 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.122.

²⁴¹ See ‘Umar Faruq ‘Abd-Allah, *Malik’s Concept of ‘Amal in the Light of Maliki Legal Theory*, (unpublished PhD. Thesis), The University of Chicago, Illinois, 1978, p. 510-511; and Yasin Dutton, *Original Islam: Malik and the Madhhab of Madina*, Routledge, 2007, p.77-84.

While Malik gauged solitary (*ahad*) hadith against Medinese praxis (*'Amal*), Abu Hanifa critiqued those same hadith in terms of their harmony or incongruity with the standard textual norms that were the basis of his jurisprudence. In Hanafi jurisprudence, the solitary hadith did not constitute sufficient valid proof for establishing the Prophetic Sunnah. The Hanafis however did differ over the criteria they used to determine regularity and irregularity (*shudhudh*) in solitary hadith.²⁴²

When *Hadith Ahad* Conflicts with other Evidence²⁴³

- **For the Hanafi scholars**, *Istihsan*, *Qiyas*²⁴⁴ and *Ijma'* (theoretically) are more authoritative than *Ahad* narrations.
- **For Maliki scholars**, *Amal* of Madinah, *Istihsan/maslahah*, and *Qiyas* are more authoritative than *Ahad* narrations.²⁴⁵ Imam Malik would rely on a solitary *Hadith* only on the condition that it did not disagree with the practice of the Madinese (*Amal Ahl Al-Madinah*).²⁴⁶
- **Shafi'i scholars** view *Ijma'* and *Qiyas* as more authoritative than a *Hadith Ahad*.²⁴⁷

²⁴² Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.112.

²⁴³ For more detail discussion see, Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.100-108; Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA, 2006, p.116-117; Jonathan A. C. Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World*, Oneworld Publications, Oxford, 2009, p.153-155; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.101-102, 132-135; Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.107-129.

²⁴⁴ Unless the narrator of the *ahad* hadith was known to be a Faqih, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.102

²⁴⁵ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.297; Abdulrahman bin Abdullah al-Sha'lan, *Usul al-Fiqh al-Imam Malik*, p.762-881; Muhammad al-Amin al-Shinqiti al-Maliki, *Sharh Maraqqi al-Suu'd*, p.350, Dar Alam al-Fawa'id, Riyadh.

²⁴⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.103

²⁴⁷ Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA, 2006, p. 116.

- **For Hanbali scholars** a *Hadith Ahad* is considered more authoritative if it conflicts with any other evidence, with the sole exception of the Qur'an or *Hadith Mutawatir*.²⁴⁸ According to Ibn Qayyim, Ahmad bin Hanbal granted precedence to sound hadith over practice (*'amal*), opinion (*ra'i*), analogy (*qiyas*), the opinion of the companions and silent consensus (*ijma' sukuti*).²⁴⁹

The concern by some scholars for irregular (*shadhdh*) solitary (*ahad*) hadith which appear to contradict the clear aims or purposes of the Qur'an, is also based on the warning and advice attributed to the Prophet (p): "*Hadiths shall be divulged from me in great numbers. Whatever comes down to you from me that is in accordance with the Qur'an is from me, but **whatever comes down to you from me that contradicts (yukhalifu) the Qur'an is not from me***".²⁵⁰ According to Umar F. Abdullah, Abu Zahra also links Malik's attitude to solitary (*ahad*) hadith to his concern for the general good (*maslahah*).²⁵¹

According to Umar F. Abd-Allah, Imam Shafi'i is reported to have said, "If a hadith is authentic, it is the School (*madhhab*) that I follow", and "If a hadith is authentic, take my (contrary) School's (position) and dash it against the wall". According to Al-Qarafi, if by this Shafi'i means that he will follow the implications of authentic hadith whenever there are no other legal arguments conflicting with their implications, then there is no difference between him and any other jurist. But if by these statements, he means that he will always follow the implications of an authentic hadith despite the presence of strong contrary, legal arguments

²⁴⁸ It appears that the Hanbali School of Jurisprudence has not regarded anything other than the Qur'an and *Sunnah Mutawatira* to be more authoritative than *Sunnah Ahad*. The superiority of these sources over *Hadith Ahad* comes from the fact that a *Hadith ahad* in the Hanbali School (as with the other three major Schools) cannot abrogate the Qur'an or *Hadith Mutawatir*. The majority of the Hanbali School regards *ahad* narrations on their own as not giving the certainty required to establish creed (*aqidah*). Otherwise Ahmad bin Hanbal seems to have not made any distinction between the authority of the Qur'an and sound *Sunnah* (whether *mutawatir* or *ahad*) and no other tool of *ijtihad* may supersede them. See Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA, 2006, p.117-118, and Abdul Hakim I. Al-Matroudi, *The Hanbali School of Law and Ibn Taymiyyah: Conflict or Conciliation*, Routledge, New York, 2006, p.32-38, 45-46.

²⁴⁹ Cited in Abdul Hakim I. Al-Matroudi, *The Hanbali School of Law and Ibn Taymiyyah: Conflict or Conciliation*, Routledge, New York, 2006, p.34.

²⁵⁰ Quoted in Abu Yusuf, *Al-Radd*, p.24-25; cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.114.

²⁵¹ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.117.

against its overt implications, then, Qarafi asserts, Al-Shafi'i went against the consensus of other jurists.²⁵²

Words of caution over interpretation of single-chained hadith

Imam Abu Yusuf stresses that great caution is required by scholars to draw the correct conclusions from soundly transmitted irregular hadiths. He does say: "...Hadith that are irregular (*shadhdh*) are not to be followed."²⁵³ However, he also goes on to say elsewhere that, "...the Hadiths of God's Messenger have (diverse) meanings (*ma'an*), perspectives (*wujuh*), and interpretations, which only one whom God helps to that end can understand and see clearly".²⁵⁴

According to Imam Al-Shatibi, authentic statements may, as a matter of course, become ambiguous when removed from their original context. Such ambivalence pertains to solitary hadiths as well as other texts. In his view, it is the duty of any jurist giving a legal opinion to remove the ambiguity of such texts by finding their proper context prior to applying them. Only then can sound conclusions be drawn from them.²⁵⁵ Al-Shatibi holds that early communal praxis (*'Amal*) constitutes one of the surest criteria against which to measure solitary hadith, assess their true meaning, and discern a proper context for them.²⁵⁶

It may be observed that considerable disagreement among the Schools of Juristic Thought is based on the various levels of authority given to *Hadith Ahad* with respect to other proofs (*adillah*) or tools for deriving rulings. As a result of these different approaches to the texts, there is tremendous diversity of opinion within the body of *Fiqh*. This diversity may be seen as a positive reflection of the universality and flexibility of the *Shari'ah*. A common maxim in support

²⁵² Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.116.

²⁵³ Abu Yusuf, *Al-Radd*, p.103-105, cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.119.

²⁵⁴ Abu Yusuf, *Al-Radd*, p.38, cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.120.

²⁵⁵ Al-Shatibi, *Al-Muwafaqat*, 3:85-93, 76,98; cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.122.

²⁵⁶ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.122.

of this view is that “There is mercy for the Muslim community in the differences of opinion among the learned” (“*Rahmat al-Ummah fi ikhtilaf al-a’immah*”).²⁵⁷

DISCUSSION QUESTIONS:

1. What is the meaning and implication of the Qur’an being described as “*Qati’ thubut*”?
2. What is the difference between hadith and *Sunnah*?
3. List some of the major factors considered by scholars to determine the relative strength or authenticity of hadith.
4. Explain the meaning and types of hadith *Mutawatir*.
5. Where does the certainty of hadith *Mutawatir* come from?
6. What reasons do you think some would have for still regarding those who reject all hadith (including *Mutawatir*) as Muslims – even though misguided?
7. What do you think is an indication that a particular *sunnah* is based on hadith *mutawatir*?
8. What are the main differences between hadith *Mutawatir* and Hadith *Ahad*?
9. Describe the differences between the 3 main types of hadith *Ahad* – *gharib*, *Aziz* and *Mash-hur*.
10. In what way do scholars of hadith (*Muhaddithun*) differ from scholars of *usul al-fiqh* and *Mujtahid* in the determination of the reliability of single-chained (*Ahad*) hadith?
11. Discuss the authority of solitary (*ahad*) hadith that are not conflicting with other evidences (*adillah*) and their capacity to make matters permissible or prohibited – according to the 5 or 7 value judgments (*ahkam*) of *Shari’ah* - in each of the 4 major *Sunni* Schools of Law:
 - a) Hanafi
 - b) Maliki
 - c) Shafi’i

²⁵⁷Muhammad bin 'Abd al-Rahman *al-Dimashqi*, *Rahmat al-Ummah fi Ikhtilaf al-A'immah*, Dar al-Kutub al-'ilmiyyah, Beirut. A similar saying is also purported to be made by Ibn Qudama al-Hanbali in *Al'Aqa'id*; al-Qasim ibn Muhammad ibn Abi Bakr al-Siddiq as mentioned by Al-Hafiz al-Bayhaqi in his book "*al-Madkhal*" and al-Zarkashi in his "*Tadhkirah fi al-ahadith al-mushtaharah*"; and Imam Malik according to al-Hafiz Ibn al-Mulaqqin in his "*Tuhfat al-muhtajilaadillat al-Minhaj*" and Ibn al-Subki in his "*Tabaqat al-Shafi'iyyah*."

d) Hanbali

12. Discuss the relative authority of solitary (*ahad*) hadith when they clash or conflict with other sources (*adillah*) of *shari'ah* such as *Ijma*, *Qiyas*, *Amal*, *Istihsan*, *Maslahah*, etc. according to the following schools of law:

a) Hanafi

b) Maliki

c) Shafi'i

d) Hanbali

LESSON 26: DEGREES OF CERTAINTY IN THE MEANING OF TEXTS

Understanding the meaning or implication of the text is an attempt to achieve greater certainty regarding what exactly was meant by the Lawgiver - Allah. In other words, one is saying, “How am I sure that what is understood by what God says is actually what God meant? I want to submit to what God or His Prophet meant, and not to just any possible or probable meaning.”

Scholars of Islamic Jurisprudence are therefore concerned about the certainty of meaning in texts. Certainty regarding meaning can best be ascertained by an authentic text’s **clarity**.

Dr. Jasser Auda explains,

When jurists talk about “an evidence” from the Qur’an or the Prophetic tradition, they actually mean a ruling that is derived from a specific expression of a verse or hadith... Expressions, or ‘terms’ are categorized in terms of clarity (*wuduh*), implication (*dilalah*), and scope (*shumul*). These expressions and the methods of deriving meanings/rulings from them is a shared concern for all schools of the Islamic law in their search for greater certainty regarding the meanings and implications of the texts.

These categorizations are further sub-divided into other classifications and further sub-classifications. They include, ‘clear’ (*wadhih*) and ‘unclear’ (*ghayrwadhih*), ‘firmly constructed’ (*muhkam*), ‘text’ (*nass*), ‘apparent’ (*zahir*), ‘explained’ (*mufassar*), ‘implicit’ (*khafi*), ‘ambiguous’ (*mushkil*), ‘general/compound’ (*mujmal*), ‘resembling’ (*mutashabih*), etc.; ‘clear expression’ (*dilalah al-ibarah*), ‘indirect implication’ (*dilalah al-isharah*), ‘obvious analogy’ (*qiyas al-awla*), ‘implying omittance’ (*dilalah al-iqtida*), ‘contrary implication’ (*mafhum al-mukhalafah*), etc.; ‘General’ (*‘am*), ‘specific’ (*khas*), ‘unqualified’ (*mutlaq*), ‘qualified’ (*muqayyad*), etc.²⁵⁸

In basic terms, meaning in any text of the Qur’an or *Sunnah* is either categorized as certain and unambiguous (*qat’i*), or uncertain and therefore only speculative (*zanni*). Where the meaning of the text is speculative (*zanni*), there is respect for differing interpretations. These distinctions are further broken down below:

²⁵⁸Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.88-106; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.117-201; Muhammad bin Hussain bin Hassan Al-Jizani, *Ma’alim fi Usul al-Fiqh*, Dar Ibn al-Jawzi, Jeddah, 1996, p.392-397.

1. **Qat'i al-dilalah**– This is where the text has an explicit, definitive and unambiguous meaning. In other words, the meaning is clear and not debatable. If this is found in the Qur'an or *Hadith Mutawatir*, it provides certainty of truth and may be called 'absolute truth'.²⁵⁹ (E.g. In the equation: $2 + X = 5$, the value of "X" could be nothing else but "3").

Some verses with definitive (*qat'i*) text in the Qur'an include (what is *qat'i* is underlined):

In what your wives leave, your share is a half if they leave no child; but if they leave a child, you get a fourth after payment of legacies and debts. In what you leave, their share is a fourth if you leave no child; but if you leave a child, they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts so that no loss is caused (to any one). Thus is it ordained by Allah. And Allah is All-Knowing, Most Forbearing. (Qur'an 4:12)

The woman and the man guilty of fornication (zina), flog each of them with a hundred stripes. Let not compassion move you in their case, in a matter prescribed by Allah, if you believe in Allah and the Last Day; and let a party of the believers witness their punishment. (Qur'an 24: 2)

And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors. (Qur'an 24: 4)

2. **Zanni al-dilalah**– This refers to text where the meaning is probable, speculative and debatable. It is open to alternative interpretations and therefore provides only relative truth.²⁶⁰ (E.g. In the equation $2 + X + Y = 10$, the value of "X" could vary).

For example, the Qur'an states (*zanni* texts are underlined):

²⁵⁹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.27-37.

²⁶⁰ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 27-37.

Prohibited to you [for marriage] are: your mothers, daughters, sisters; father's sisters, mother's sisters; brother's daughters, sister's daughters; foster-mothers [who gave you suck], foster-sisters; your wives' mothers; your step-daughters under your guardianship, born of your wives to whom you have gone into—and no prohibition if you have not gone into; (those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past; for Allah is Oft-Forgiving, Most Merciful. (Qur'an 4:23)

The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land. That is their disgrace in this world, and a heavy punishment is theirs in the Hereafter. (Qur'an 5:33)

O you who believe! When you prepare for prayer, wash your faces, and your hands [and arms] to the elbows; rub your heads [with water]; and [wash] your feet to the ankles. If you are in a state of ceremonial impurity, bathe your whole body, but if you are ill, or on a journey, or one of you has relieved yourself of waste, or you have been in [sexual] contact with women, and you find no water, then take for yourselves clean sand or earth, and rub it on your faces and hands. Allah does not wish to place you in difficulty, but to make you clean, and to complete His favour to you, that you may be grateful. (Qur'an 5:6)

Implications of Commands (Amr) and Prohibitions (Nahy)

It is important when searching for certainty regarding the meaning and implications (*dilalah*) of the text of the Qur'an or *Sunnah*, that a student does not jump to conclusions regarding the implications of statements that appear as commands (*amr*) or as prohibitions (*nahy*).²⁶¹ While a command or an injunction using the prohibitive words, "Do not..." may seem explicit and clear-cut (*qat'i*), such statements may also be considered debatable in their legal implication (*zanni*).

²⁶¹ For further reading on the criteria used by various scholars in determining when a command (*amr*) or prohibition (*nahy*) would imply either an obligation (*fard/wajib*), recommendation (*mustahab*), permissibility (*mubah*), discouragement (*makruh*), or a prohibition (*haram*), see Ahmad Hasan, *The Principles of Islamic Jurisprudence: The Command of the Sharia and Juridical Norm*, Adam Publishers, New Delhi, 2005, p.23-153. See also Khalid Shuja', *Dawabit Sarf al-Amr an al-Wujub wa al-Nahyi an al-Tahrim*.

Maliki jurists for example, usually assert that generally unrestricted meanings/implications from foundational texts should be deemed speculative or presumptively authoritative (*zanni*) and not conclusive (*qat'i*). The overt legal text of the Qur'an or Sunnah does not independently constitute universal statements of law, without support from other principles and sources of law.²⁶²

Kamali elaborates on this below:

Since a verbal command (*amr*) can mean different things, namely an obligatory order (*fard* or *wajib*), a mere recommendation (*mustahab* or *mandub*)²⁶³, or even permissibility (*mubah*), the *ulema* have differed as to which of these is the primary and which is the secondary meaning of a command. Some have held the view that '*amr* is in the nature of a homonym (*mushtarak*) which imparts all of these meanings²⁶⁴. Others have held that *amr* partakes in only two of these concepts, namely obligation and recommendation, but not permissibility. Still others have held that *amr* implies a permission to do something, and that this is the widest meaning of *amr*, which is common to all three of the foregoing concepts.

According to the majority opinion, however, a command by itself, that is, when it is not attended by clues or circumstances that might give it a particular meaning, implies obligation or an emphatic demand only.²⁶⁵ But this may change in the event of other indications being present, which might reduce a command to permissibility,

²⁶² Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.90-91

²⁶³ Abu Hashim, Mu'tazila, some jurists and a narration from Shafi'i are of the view that a command ('*amr*) implies recommendation not obligation (Muhammad bin Ali al-Shawkani, *Irshad al-Fuhulila Tahqiq al-Haq min Ilm al-Usul*, Dar al-Fadila, Riyadh 1421 AH, vol.1, p.442. Fakhrudeen Muhammad bin Umar bin Husain Al-Razi, *Al-Mahsul fi Ilm al-Usul al-Fiqh*, Mu'assasat al-Risalah, vol.2, p.44.

²⁶⁴ Ashari held this "stand still" position where judgment was suspended until there was additional evidence for a particular position. See, Ibn Taimiyyah, *Al-Musawwadah fi Usul al-Fiqh*, Dar al-Fadilah, Riyadh, 1422 AH, vol.1, p.83.

²⁶⁵ Muhammad bin Ali al-Shawkani, *Irshad al-fuhul ila tahqiq alhaq min 'ilm al-Usul* vol.1, p.442; Muhammad al amen bin Muhammad al mukhtar al-Shinqity, *Sharh Maraqqi al-Suud*, Dar Aalam al-fawa'id, p.154; Abu Zahra, *Usul al-Fiqh*, Dar al-Fikr al-Araby, Beirut, p.176; Abdurahman bin Abdullah Al-Sha'lan, *Usul Fiqh Imam Malik*, Imam Muhammad bn Saud Islamic University, KSA, 1424, vol.1, p.407; Muhammad bin Salih Ibn al-Uthaimeen, *al-Usul min Ilm al-Usul*, Dar al-Iman, Egypt, p.18; Muhammd bn Ahmad bn Abdul Aziz Taqiyy al-deen Abu al-Baqai bin al-Najjar, *Sharh Al-kaukab al Munir*, Maktabah al-Ubaikan, Madinah, 1418 AH, vol.3, p.19; Ibn Taimiyyah, *al Musawwadah fi Usul al-Fiqh*, Dar al Fadilah, Riyadh, 1422 AH, vol.1, p.83.

recommendation, or indeed to a variety of other meanings. Thus when we read in the Qur'an commands such as *kulu wa'shrabu* ('eat and drink') in Surah al-A'raf, 7:31, the indications are that they amount to no more than permissibility (*Ibahah*). For eating and drinking are the necessities of human life, and a command in respect of them must logically amount to a permissibility only. Similarly the Qur'anic permission in respect of hunting after the completion of the *hajj* ceremonies given in Surah al-Ma'idah 5:2 (*waidhahalaltumfastadu*), and its address to the believers to 'scatter in the land' (*fa'ntashirufi'l-ard*) after performing the Friday prayers (Surah al-Jumu'ah, 62:10) are both in the imperative form. But in both cases the purpose is to render these activities permissible only.²⁶⁶

[Similarly,] a prohibition (*nahy*), like a command, may convey a variety of meanings. Although the primary meaning of *nahy* is illegality or *tahrim*, *nahy* is also used to imply a mere reprehension (*karahiyyah*), or guidance (*irshad*), or reprimand (*ta'dib*), or supplication (*du'a*). An example of *nahy* which implies reprehension is the Qur'anic *ayah* addressing the believers to '*prohibit not [la tuharrimu] the clean foods that God has made lawful to you*' (al-Ma'idah, 5:87). *Nahy* which conveys moral guidance may be illustrated by the Qur'anic *ayah* addressing the believers to '*ask not questions about things which, if made plain to you, may cause you trouble*' (al-Ma'idah, 5:104). An example of *nahy* which implies a threat is when a master tells his recalcitrant servant, '*Don't follow what I say and you will see.*' An example of *nahy* which conveys supplication in the Qur'an, occurs in Surah al-Baqarah (2:286) which reads, '*Our Lord, condemn us not if we forget.*'

Since *nahy* can convey several meanings, the *ulema* have differed as to which of these is the primary (*haqiqi*) as opposed to the secondary or metaphorical meanings of *nahy*. Some have held that illegality (*tahrim*) is the primary meaning of *nahy* while others consider reprehension (*karahiyyah*) to be the original meaning of *nahy*. According to yet another view, *nahy* is a homonym in respect of both (i.e. *nahy* could be either *tahrim* or *karahiyyah*). The majority (*jumhur*) of *ulema* have held the view that *nahy* primarily implies *tahrim*, a meaning which will be presumed to prevail unless there are indications to suggest otherwise. An example of *nahy* in the Qur'an which has retained its primary meaning is the phrase '*la taqtulu*' in the *ayah* which provides, '*slay not life which God has made sacred*'.

²⁶⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.188-193

There is no indication in this text to warrant a departure from the primary meaning of *la taqtulu*, which must therefore prevail. The primary meaning of *nahy* may be abandoned for a figurative meaning if there is an indication to justify this. Hence the phrase *la tu'akhidhna* ('condemn us not') implies supplication, as the demand here is addressed to Almighty God, and is hence a demand from a position of inferiority, which indicates that the correct meaning of *nahy* in this context is supplication, or *du'a*.²⁶⁷

In view of the foregoing, it is essential that there is careful analysis of the relevant texts and context of the Qur'an and *Sunnah* before one concludes on the legal implications of commands (*amr*) and prohibitions (*nahy*). The mere existence of commanding wording (an imperative word or an imperative phrase) does not provide a clear-cut and certain case of obligation or prohibition.

Towards a Deeper Appreciation of the Meaning and Implication of the Text (*Dilalah Al-Nass*)

The clarity of the text and the legal implications of commands and prohibitions are important in "maximizing certainty" regarding submission to God's will. It is therefore important to know how did God's Prophet (ﷺ) understand the revelation given to him?

It is also important to know what was the **intent** and **implication** of the words and deeds of the Prophet (ﷺ) for the purpose of legislation, and what is meant by his "***Sunnah***"? Was everything the Prophet (ﷺ) did either compulsory or encouraged for everyone to emulate? Were some of his actions and statements meant in a particular context for a specific purpose and therefore not legally binding (*Aadah*), or were they all legally binding on everyone (*Tashri'i*)?

These questions are explored further in the next series of lessons.

DISCUSSION QUESTIONS:

1. What is meant by *qat'i al-dilalah* and *zanni al-dilalah* when applied to a text?

²⁶⁷ The entire passage from p.63 above is extracted from Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.196.

2. Why is it important to distinguish between the certain (*qat'i*) and speculative (*zanni*) when referring to the meaning and implication (*dilalah*) of a text of the Qur'an or *Sunnah*?
3. Give examples of texts that are *qat'i al-dilalah* and those that are *zanni al-dilalah*.
4. What level of certainty do commands (*amr*) and prohibitions (*nahy*) give a particular text of the Qur'an or *Sunnah*?
5. What are the various opinions regarding the automatic or primary meanings and implications of a command (*amr*) or prohibition (*nahy*) in the text?
6. Why do scholars differ on the primary implication of a command or prohibition?
7. How could certainty be maximised regarding the implications of commands and prohibitions?
8. When do the majority of scholars consider a command (*amr*) as implying an obligation?
9. Give textual examples of a command (*amr*) that does not imply an obligation (*fard/wajib*).
10. Give textual examples of a prohibition (*nahy*) that does not imply a prohibition (*haram*).
11. When do the majority of scholars consider a prohibition (*nahy*) as implying an illegality (*tahrim*) of something?

LESSON 27: LET'S REVIEW!

DISCUSSION QUESTIONS:

Find a partner to discuss the following:

1. Explain 3 differences between *Fiqh* and *Shari'ah*.
2. Use a metaphor or analogy of a tree or anything else to describe the relationship between the *Shari'ah*, *Usul al-Fiqh* and *Fiqh*.
3. Discuss why an individual should be cautious of speaking in God's name with the authority of God. Mention at least one source of evidence to support this caution.
4. Mention the action that would amount to speaking in God's name.
5. Discuss one way in which a scholar can minimize the risk of misrepresenting God and His Prophet.
6. What are two forms of certainty when analyzing texts?
7. How is it possible for the Qur'an to simultaneously provide some certainty and also some uncertainty?
8. Name and describe 5 categories in the classification of *hadith* authenticity.
9. How authoritative are *Hadith Mutawatir* and *Hadith Ahad* respectively for deriving legislation? Give reasons for your answer.

SECTION 4: SEPARATING THE ETERNAL FROM THE HISTORICAL: FOLLOWING THE SUNNAH vs. SEERAH

LESSON 28: UNDERSTANDING THE “SUNNAH”

The term “*Sunnah*” is used by the various strands of Islamic sciences and scholars in different ways.²⁶⁸ In its juristic usage, *Sunnah* also has different meanings. To the *ulama* of **Usul al-Fiqh**, *Sunnah* refers to a source of the *Shari'ah* and a legal proof next to the Qur'an. But to the *ulama* of **Fiqh**, *Sunnah* primarily refers to a legal (*shar'i*) value which falls under the general category of *Mandub*. However, it is not necessarily confined to the *Mandub*. In its other usage, namely as a source of *Shari'ah*, *Sunnah* may authorize and create any of the following: *Wajib*, *Haram*, *Makruh* and *Mubah*. Thus, a *Faqih* might say that this or that act is *Nafila* or *Sunnah*, which means that it is neither *Fard* nor *Wajib*; rather, it is *Mustahab* or *Mandub*²⁶⁹, whereas in the usage of *Usul al-Fiqh*, one might say that this or that ruling has been validated by the Qur'an or by the *Sunnah*.

Ibn Abd al-Barr states that the word “*Sunnah*” when used in general without qualifications was meant to refer to the *Sunnah* of God's Messenger. If its source of authority was someone else, it would be qualified by specific reference to that person (or persons) as in the case of “the *sunnah* of Abu Bakr and Umar”. Even when a *Sunnah* was attributed to someone else, it was not

²⁶⁸ Jamal al-Din M. Zarabozo, *The Authority and Importance of the Sunnah*, al-Basheer Publications, USA, 2000, p.8-26; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.58-62; Abdullah bin Yusuf al-Juda'i, *Taysir Usul al-Fiqh*, p.98-101; Abdulmuhsin al-Abbad, *Al-Haththu ala 'ittiba'i al-Sunnah*, p.8-10, (al-Maktabah al-Shamilah

²⁶⁹ Jamal al-Din Abu Muhammad Abd al-Rahman al-Isnawi, *Nihayah al-Sul fi Sharh al-Minhaj al-Wusul* 'Ilm al-Usul. 3 Vols. Matba'ah al-Tawfiq, n.d. vol. II, p. 170; Muhammad bin Ali al-Shawkani, *Irshad al-Fuhul Ila Tahqiq al-Haqq min 'Ilm al-Usul*, Dar al-Fikr, Cairo, n.d., p.33; Muhammad Hassan Hit, *al-Wajiz fi Usul al-Tashri' al-Islami*, 2nd ed. Mu'assassah al-Risalah, 1984, p. 264 cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, 61; see also Jamal al-Din M. Zarabozo, *The Authority and Importance of the Sunnah*, al-Basheer Publications, USA, 2000, p.8-26.

because he was regarded as an independent authority, but because their authority was associated with the Prophet (ﷺ).²⁷⁰

Distinguishing *Sunnah* from *Seerah*

The *Sunnah* of the Prophet (ﷺ) usually refers to the actions, sayings and tacit approvals of the Prophet (ﷺ). The *Seerah* of the Prophet (ﷺ), however, refers to the biography and historical events that happened during his lifetime. **The *Seerah* includes his *Sunnah*. However, not all of the *Seerah* constitutes *Sunnah*.** In the Maliki School of Thought, the practice of the *Sahabah* and ‘People of Madinah’ (*Amal*) was regarded as having captured the normative *Sunnah* that was meant to be emulated and put into practice by Muslims. Hadith that were not supported or part of the *Amal* of Madinah were therefore often regarded as not normative but tied to specific cases and incidences, and were not a part of the *Sunnah* that was required to be put into practice.²⁷¹

It has become necessary for scholars to distinguish what in the *Seerah* is *Sunnah*, and therefore legally applicable to Muslims. The information in the *Seerah* literature also does not undergo the level of authentication as do the Hadith or *Sunnah* literature. The *Seerah* includes a lot of material without complete chains of narrators (*isnads*).²⁷² This challenge to its certainty makes it problematic to consider the *Seerah* as a source or evidence for *Shari’ah* rulings.

²⁷⁰ Cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.94-95. See this reference for more on the use of the term *Sunnah* – “*Sunnat Allah*”, “*Sunnah of the Muslims*”, etc.

²⁷¹ See Yasin Dutton, “Amal vs. Hadith in Islamic Law: The Case of Sadl al-Yadayn (Holding One’s Hands by One’s Sides) When Doing the Prayer”, *Islamic Law and Society*, vol.3, No. 1. Brill Academic Publishers, 1996, p.14, available on <http://www.jstor.org/>; See a more detailed discussion of this subject in, ‘Umar Faruq Abd-Allah, *Malik’s Concept of ‘Amal in the Light of Maliki Legal Theory*, (unpublished PhD. Thesis, The University of Chicago, Illinois, 1978); Yasin Dutton, *The Origins of Islamic Law: The Qur’an, the Muwatta’ and MadinanAmal*, RoutledgeCurzon, U.K., 2002.

²⁷² Jonathan A. C. Brown, *Hadith: Muhammad’s Legacy in the Medieval and Modern World*, Oneworld Publications, Oxford, 2009, p.281

The Legislative Implications of the *Sunnah*: The Prophet's Intent of Legislation

The Prophet (ﷺ) is reported to have said, "Follow my *Sunnah* and the *Sunnah* of my rightly guided Companions."²⁷³

The Companions of the Prophet (ﷺ) and jurists recognized the need to distinguish the different intents and legal implications of the words and actions (***Sunnah***) of the Prophet (ﷺ).²⁷⁴ At the crux of the matter, the Companions and jurists are challenged to determine in the Prophetic traditions (*Sunnah*) what is of permanent legislative value, and what is contextual and therefore does not bear any legislative connotation.²⁷⁵

Not all the actions, sayings and decisions of the Prophet (ﷺ) were dictated by divine revelation.²⁷⁶ In addition, not all the actions and sayings of the Prophet (ﷺ) are meant to be emulated by everyone. **Some of his actions were specific to him as the Last Prophet.**²⁷⁷ Others were part of his role as a Messenger and Prophet **to guide humanity**. Still others were actions by him in response to his **context** and the circumstances he found himself in, while others were actions of his in his capacity as an exemplary Arab man living in the place and times of Arabia in which he found himself.²⁷⁸

²⁷³ Al-Bukhari, cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 60; *Sunan Abu Dawud*, 4607; *Sunan Ibn Majah*, 42; *Sunan Al-Darimi*, 95

²⁷⁴ Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari'ah*, IIIT, London, 2006, p.31.

²⁷⁵ For more detail on this subject and other references, see Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari'ah*, IIIT, London, 2006, p.31, p.351-352.

²⁷⁶ A verse from the Qur'an commonly quoted to support the idea that all statements and actions of the Prophet (p) were divinely directed is: "Nor does he speak from (his own) inclination; It is not but a revelation revealed (to him); Taught to him by one intense in strength (i.e., Gabriel)" (Q53:3-5) This verse is understood by many jurists to refer to the revelation of the Qur'an via the Angel Gabriel, and not to all statements made by the Prophet (p) on all issues and on all occasions. See: Ibn 'Ashur, *al-Tahrir wa al-Tanwir*, commentary of the cited verses. For further reading on this issue see also, Muhammad Sulaiman al-Ashqar, *Af'al al-Rasul wa Dilalatuha al al-Ahkam al-Shar'iyyah*, Beirut: Mu'assasa al-Risalah, 5th, edition, 1996, vol.1, p.181.

²⁷⁷ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 67-68.

²⁷⁸ See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.67-68 for more discussion on legal and non-legal *Sunnah*.

Ibn Abi Layla is reported to have said: “A man does not understand hadith until he knows what to take from it and what to leave.”²⁷⁹ As stated earlier, for Malik and Abu Hanifa in particular, knowledge of the *Sunnah* was the criterion against which hadiths were judged, interpreted, accepted, or rejected – not the reverse. They judged the contents of hadith by standards independent of their semantic content (*matn*).²⁸⁰

Classical scholars who discussed this issue in great depth²⁸¹ include **Ibn Qutaybah** (d.276 AH), **Al-Qarafi** (d. 684 AH), **Ibn Qayyim** (d. 748 AH), **Al-Shawkani** (d. 1250 AH)²⁸², and **Ibn Ashur** (d. 1325), etc.²⁸³ Ibn Qutaybah(213-276AH) was among the earliest to write about the Prophet’s intent. He stated that the Prophet’s statements and actions comprised three types: (1) what had been revealed to him by the Angel Jibril; (2) what God allowed him to institute based on his personal judgment, depending on the cases presented to him; (3) what he would issue as a matter of discipline for his followers so that if they follow it they become more virtuous, but would not have any detriment if they didn’t do them.²⁸⁴ After Qarafi also contributed work to the topic, this issue was taken up by the eminent Hanbali scholar Ibn Qayyim al-Jawziyyah.²⁸⁵ In more contemporary times, the Indian scholar **Shah Wali Allah Dahlawi** dealt with the issue along similar lines in his seminal work *Hujjat Allah al-Balighah*.²⁸⁶

Ibn Ashur covered the topic comprehensively in his *Treatise on Maqasid al-Shari’ah*, yet this issue is still a matter of serious debate among contemporary Muslim scholars.²⁸⁷ A summary of

²⁷⁹ Cited in Ibn Abd Al-Barr, *Jam’i Bayan al-Ilm*, vol.2, p.130, cited in Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, vol. 1, AQSA Publications, 2006, p.46.

²⁸⁰ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.96-97.

²⁸¹ See Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari’ah*, IIIT, London, 2006, p.28-32, 351-352.

²⁸² See Imam Muhammad bin Ali Al-Shawkani, *Irshad al-Fuhul*, Dar al-Fadila, Riyadh, 2000, p.198, for his classification into 7 categories of the implications of the actions of the Prophet (ﷺ).

²⁸³ See Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari’ah*, IIIT, London, 2006, p.28-32, 351-352.

²⁸⁴ Abu Muhammad ‘Abd Allah ibn Muslim ibn Qutaybah, *Ta’wil Mukhtalaf al-Hadith*, ed. Muhammad Abd al-Rahim, Dar al-Fikr, Beirut, 1995, p.180-183.

²⁸⁵ *Zad al-Ma’ad fi Hadyi Khayr al-Ibad*, ed. Shu’ayb al-Arna’ut et al., Mu’assassat al-Risalah, Beirut, 1985, vol. 3, p. 489-490.

²⁸⁶ Shah Wali Allah of Delhi, *The Conclusive Argument from God*, trans. Marcia K. Hermansen (Leiden: E.J. Brill, 1996), vol. 1, p. 373-375.

²⁸⁷ See for example, Yusuf al-Qaradawi, *Kayfa Nata’amal ma’a al-Sunnah: Ma’alim wa Dawabit*, Herndon, VA: IIIT, 1990; Muhammad Mahdi Shams al-Din, *Al-Ijtihad wa al-Tajdid fi al-Fiqh al-Islami*, al-Mu’assassah al-Dawliyyah, Beirut, 1998, p.168-175.

this debate has been provided by **Yusuf al-Qaradawi** in *Al-Janib al-Hadari fi al-Sunnah al-Nabawiyyah*.²⁸⁸

As has been repeated in this material, it is important for young Muslims to appreciate that declaring something from the Qur'an or, in this instance, from the *Sunnah* as implying an obligation (*Fard/Wajib*) or a prohibition (*Haram*) requires significant certainty not only in the **AUTHENTICITY** and **MEANING**, but also in the **LEGISLATIVE IMPLICATIONS of the text of the hadith** under discussion.

The meaning of the text is therefore best understood when studied along with its own context. Disregarding context easily becomes pretext for misinterpreting and misapplication of the text.
Text without context is pretext!

DISCUSSION QUESTIONS:

1. Explain at least 4 different meanings of the term "*Sunnah*" according to various fields and specializations.
2. What are some of the differences between "*Sunnah*" and "*Seerah*"?
3. What are some of the differences between *Sunnah* and hadith?
4. How did scholars determine whether or not a hadith was transmitting a *sunnah* that was meant to be put into practice by the community (*ummah*)?
5. Why are there different legal implications of the *Sunnah*?
6. List at least 5 well known scholars who have treated in some depth, the subject of the Prophetic intent on legislation and the legal implications of the *Sunnah*.
7. Why do you think it was the *Faqih* or *Mujtahid* and not the *Muhaddith* that was the final arbiter or decider regarding the credibility of hadith and what better represented the *Sunnah*?

²⁸⁸*Al-Sunnah al-Nabawiyyah wa Manhajuh fi Bina' al-Ma'rifah wa al-Hadarah*, proceedings of a conference jointly organised by IIIT and al-Majma' al-Malaki li-Buhuth al-Hadarah al-Islamiyyah, Amman, 15-19 Dhu al-Qi'dah 1409/ 19-23 June 1989, vol. 2, p. 976-1029.

LESSON 29: IBN ASHUR'S CLASSIFICATION

Ibn Ashur classified the Prophet's roles or "Prophetic intents" regarding legislation into twelve.²⁸⁹ Below is a summary of Ibn Ashur's 12 classifications by Dr. Jasser Auda.²⁹⁰ These classifications aid in differentiating between the Prophet's actions "as a conveyer of the divine message, as a judge, and as a leader, etc.", and suggest that each of these "intents" has a different "implication in the law".²⁹¹

1. The intent of legislation (*tashri'*). One example is the Prophet's sermon at the farewell pilgrimage during which he reportedly said: "*Learn your rituals from me [by seeing me performing them] for I do not know whether I will be performing pilgrimage after this pilgrimage of mine.*" He also said after concluding the same sermon: "*Let those present inform those who are absent.*"²⁹²

2. The intent of issuing edicts/verdicts (*fatwa*). One example is the Prophet's edicts during his 'farewell pilgrimage' when a man came to him and said: '*I sacrificed before throwing the pebbles.*' The Prophet advised: '*Throw, and don't worry.*' Then another man came and said: '*I shaved before sacrificing,*' and the Prophet answered: '*Sacrifice, and don't worry.*' The narrator said that he was not asked about anything that one would do after or before without his saying. 'Do it, and don't worry.' In this case, the Prophet (p) was issuing verdicts (*fatwa*) in his capacity as a Mufti facilitating (*taysir*) the pilgrimage for those individuals who were asking.

²⁸⁹ Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari'ah*, IIIT, London, 2006, p.28-49; See also Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.233-236. All the *hadith* cited in this Lesson are taken from these references.

²⁹⁰ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.233-236. Auda lists 11 of the 12 intents discussed by Ibn Ashur. He omitted number 9 above. See Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari'ah*, IIIT, London, 2006, p. 32-45 for the complete list of 12 intents.

²⁹¹ Another category that appears not to have been captured in this classification is that of actions that were distinctly specific to the Prophet himself. These include marrying more than four wives; continuous fasting for consecutive days without breaking (*al-wisal*); and late night prayer (*qiyam al-layl* or *tahajjud*), etc. (See Tafsir Ibn Kathir, commentary on Qur'an 73:2). This category might have been deemed to include so few actions of the Prophet (ﷺ) that it did not warrant having a separate category of its own.

²⁹² See the books cited in Footnote 1 above for the detailed references of all the *hadith* in this Lesson.

3. The intent of judgeship (*qada'*). Examples of this include: (1) the Prophet's settlement of the dispute between a man from Hadramawt and a man from Kindah regarding a piece of land; (2) the Prophet's settlement between the Bedouin and his adversary, when the Bedouin said: 'O Messenger of God, judge between us'; and (3) the Prophet's settlement between Habibah and Thabit. Habibah bint Sahl, Thabit's wife, complained to the Prophet that she did not love her husband and that she wanted to divorce him. The Prophet said: *'Will you give him back his walled garden?'* She said: *'I have all that he has given to me.'* Then, the Prophet said to Thabit: *'Take it from her.'* And so he took his walled garden and divorced her.

4. The intent of political leadership (*imarah*). Examples are the prohibition of eating donkey meat in the battle of Khaybar, as these were animals that were important for transportation of goods and people in preparation for battle. The permission to cultivate barren lands by anyone was given by the prophet (p) but not meant for all contexts. The Prophet's statement at the battle of Hunayn: *'Whoever has killed an enemy and has evidence of his actions can claim the enemy's property'* was not meant as a legislation for every battle hence forth.

5. The intent of guidance and instructions; this being more general than that of legislation (*hadyu*). An example is found in Ibn Suwayd's narration, in which he said: 'I met Abu Dharr, who was wearing a cloak, and his slave too was wearing a similar one. I asked the reason for it. He replied, "I scolded a slave by calling his mother bad names." The Prophet said to me, "O Abu Dharr! Did you abuse him by calling his mother bad names? You still have some characteristics of the age of pagan ignorance. Your slaves are your brethren."'

6. The intent of conciliation (*sulh*). One example is when the Prophet requested Barirah to return to her husband after she divorced him. Barirah said: 'O God's Apostle! Do you order me to do so?' He said, 'No, I only intercede for him.' She said, 'I do not need him.' Also, Bukhari reported that when Jabir's father died, Jabir asked the Prophet to speak with his father's creditors so that they might waive some of his debt. The creditors did not want to meet with the Prophet (p). The Prophet then accepted their refusal to do so. Another example of conciliation is when Ka'ab ibn Malik demanded repayment of a debt from 'Abdullah ibn Abu Hadr, the Prophet requested Ka'ab to deduct half of the debt, and Ka'ab agreed.

7. The intent of giving advice (*isharah*) to those seeking his opinion. One example is when ‘Umar ibn al-Khattab gave someone a horse as charity and the man neglected it. ‘Umar wished to buy the horse from the man, thinking that he would sell it cheaply. When he asked the Prophet about it, he told him: ‘Do not buy it, even if he gives it to you for one dirham, for someone who takes back his charity is like a dog swallowing its own vomit.’ Also, Zayd narrated that the Prophet said: ‘Do not sell the fruits before their benefit is evident,’ but Zayd commented that this was, ‘only by way of advice, for some people had quarreled too much over that matter.’

8. The intent of counseling (*nasihah*). For example Bashir informed the Prophet that he had given one of his sons a special gift. The Prophet asked him: ‘Have you done the same with all your sons?’ He said: ‘No’. The Prophet said: ‘Do not call me as a witness to injustice.’

9. The intent of spiritual uplifting and encouraging people to follow the best forms of conduct (*takmil an-nufus*). For example, the Prophet (ﷺ) said, “My companions are like the stars (i.e. guides)”; also, “Do not abuse my Companions, for if anyone of you spent gold equal to Uhud (in God’s cause) it will not be equal to a *mudda* or even half a *mudda* spent by one of them”.

10. The intent of teaching high ideals (*ta’lim al-haqaiq al-a’liyah*). For example, the Prophet asked Abu Dharr: ‘Do you see (the mountain of) Uhud?’ Abu Dharr replied: ‘I do!’ The Prophet said: ‘If I had gold equal to the mountain of Uhud, I would love that, before three days had passed, not a single Dinar thereof remained with me if I found somebody to accept it, excluding some amount that I would keep for the payment of my debts.’ Similarly, al-Bara’ ibn ‘Azib said: ‘God’s Messenger commanded us to practice seven things and prohibited us from practicing seven. He commanded us to visit the sick, to walk behind funeral processions, to pray for someone upon sneezing, to approve of someone’s oath, to help the oppressed person, to spread the greeting of peace, and to accept the invitation of the invitee. On the other hand, he prohibited us from wearing gold rings, using silver utensils, using red saddlecloth made of cotton, wearing Egyptian clothes with silky extensions, clothes made of thick silk, thin silk, or normal silk.’ Similarly, ‘Ali ibn Abi Talib narrates: ‘God’s Apostle forbade me to use gold rings, to wear silk clothes and clothes dyed with saffron, and to recite the Qur’an while bowing and prostrating in prayer. I am not saying he forbade you these things.’

Likewise, with the same educational intent, the Prophet told Rafi' ibn Khadij: 'Do not rent your farm, but cultivate the land yourself.'

11. The intent of disciplining his companions (*ta'dib*). For example, the hadith: 'By God! He does not believe! By God! He does not believe!' It was said, 'Who is that, O Messenger of God?' He said: 'The person whose neighbor does not feel safe from his evil.' This was often in statements couched in hyperbole and overemphasized but aimed at provoking awe and fear. In other words, the statement of the Prophet was not meant to be taken literally in this context. "By God! He does not believe" does not imply that the kind of person being addressed is literally a disbeliever (*kafir*) or an apostate (*murtad*).

12. Intent of non-instruction (*tajarrud 'an al-irshad*). This includes the hadith that described the way the Prophet ate, wore his clothes, laid down, walked, mounted his animal, and placed his hands when prostrating in prayer. Another example is the report that the Prophet stopped on the farewell pilgrimage at a hill overlooking a watercourse in BaniKinanah, on which 'A'isha commented: 'Camping at al-Abtah is not one of the ceremonies of hajj, but was simply a place where the Prophet used to camp so that it might be easier for him to leave for Madinah.'

Ibn Ashur's extension of the implications (*dilalat*) of the hadith, as shown in the above examples, raises the level of 'purposefulness' in traditional methods and allows much flexibility in interpreting and applying the narrations.

According to Ibn Ashur:

"As for the capacity of non-instruction (*tajarrud 'an al-irshad*), it is not concerned with legislation, religiosity, the education of souls, and the sound management of social order of the community. It rather concerns those actions emanating from innate human nature (*jibillah*) or the requirement of material life. This is something that cannot be mistaken, for God's messenger performed actions in relation to his family affairs and the earning of living, which were not intended as legislation nor as an example to be emulated.

"Moreover, it is established in the discipline of *Usul al-Fiqh* that the Muslim community is not required to emulate those actions of God's messenger flowing from his innate

nature as a human being, but rather, each individual should follow the course that suits his condition. Such deeds include the way in which he ate, wore his clothes, lay down, walked, mounted his beast, and so on. This is so, regardless of whether these things are unrelated to the *Shari'ah* prescriptions, such as walking in the street or riding a beast on a journey, or are related to them, such as riding a she-camel when performing the pilgrimage, and placing the hands on the prayer mat before the knees when prostrating in prayer according to those who - like **Abu Hanifah** - maintain that God's messenger did so when he was old and quite stout."²⁹³

Therefore, in the search for certainty when trying to understand or derive rulings from the *Sunnah* it is essential to reach an acceptable level of certainty regarding the legislative implications of the *Sunnah* before concluding on what is binding or optional for a believer to abide by, and to be ready to respect diversity where there is reason to doubt the precise legal implications of the Prophet's words, actions or approvals.

DISCUSSION QUESTIONS:

1. Discuss with examples, at least 8 different legislative implications of the *Sunnah* presented by Ibn Ashur.
2. Distinguish between the Prophet's role and intent of legislation (*tashri'*) and that of issuing religious verdicts (*fatwa*).
3. Distinguish between the Prophet's role and intent of judgeship (*qada'*) and that of political leadership (*Imarah*).
4. Distinguish between the Prophet's intent on conciliation (*sulh*) and that of non-instruction (*tajarrud an al-irshad*).
5. In what ways are the Prophetic intents on legislation determinants in understanding the meaning and implications (*dilalah*) of the "*Sunnah*"?

²⁹³ For this last point, see Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari'ah*, IIIT, London, 2006, p. 45-46.

6. Discuss the implications of those actions of the Prophet that emanated from his nature as a human being.
7. How is the legislative implication of the *Sunnah* or the Prophet's intent on legislation related to the level of certainty (*qati*) or speculation (*zanni*) regarding the meaning (or) implication (*dilalah*) of the text of a hadith?

SECTION 5: CODE OF THE *MUJTAHID*: TERMS OF ENGAGEMENT WITH REALITY

LESSON 30: MAXIMS OF ISLAMIC JURISPRUDENCE

Maxims in any field are like the “Ground Rules” or “Rules of Thumb”. They are accepted by everyone within the field and guide application. ***Al-Qawa'id al-Fiqhiyyah*** are the major maxims of Islamic Jurisprudence.

By way of metaphor, *Usul al-Fiqh* is like the manual that comes with a car, showing how to use it. The *Qawa'id al-Fiqhiyyah* on the other hand, are like the Road Users' Guide of rules which the road traffic authority puts together to lay down the rules of driving. The fact that a person has mastered the manual describing how to drive a car and he can drive it very well does not guarantee that he knows the rules of the road unless he studies it. It is the Road Users' Guide that explains the rules that will help an individual navigate roads without causing harm to others. In other words, to know how to drive without knowing the regulations governing road use can be detrimental. The “driver's” final destination may be called the *Maqasid al-Shari'ah* (the Higher Objectives of *Shari'ah*).

Consequently, to better represent the Prophet (ﷺ), it is necessary to know the Prophet better by referring to those who knew him better (the *Sahaba*) and who understood how he dealt with various situations. From his *Sahaba* (or Companions), jurists were able to learn how the Prophet (ﷺ) dealt with issues and, therefore, derived ground rules to enable them represent the Prophet faithfully.

The Core Maxims of Islamic Jurisprudence (*al-Qawa'id al-Fiqhiyyah*)²⁹⁴

The most comprehensive and broadly-based of all maxims are known as “*al-qawa'id al-fiqhiyyah al-asliyyah*”, or the normative legal maxims, and they apply to the entire range of *Fiqh* without any specification. The Schools of Juristic Thought (*madhahib*) are generally in agreement over them. The early ‘*ulama* singled out 5 of these to say that they comprise between them the essence of the *Shari'ah* as a whole, and other maxims are simply an elaboration of these.

Maxims such as “Harm must be eliminated” (*Ad-dararu yuzal*) and “Matters will be judged by their purposes” (*Al-umuru bi-maqasidiha*) belong to this category of maxims. The other three of the normative legal maxims are: “Certainty is not overruled by doubt” (*Al-yaqinu la yazulu bish-shakk*), “Hardship begets facility” (*Al-mashaqqatu tajlibu at-taysir*) and “Custom is the basis of judgement” (*Al-'addatu muhakkamah*).

To understand the 5 core maxims is to understand the essence of Islam in five short sentences. They embody the essential spirit of the religion. In the eyes of traditional Muslim scholars, the five core maxims constitute a concise summation of everything Islam represents.²⁹⁵

These 5 major maxims are elaborated below:

1. “Matters will be judged by their purposes” (*Al-umuru bi-maqasidiha*)

Maqasid is the Arabic word for ‘purposes’ and it refers to intentions as well as objectives and goals such as are pertinent to general activities, institutions, and policies. *Al-umuru* (matters) includes not only personal actions but “general activities, institutions, policies, and the like, which are not based on intentions, but on purposes.”²⁹⁶

According to Umar Faruq Abd-Allah,

²⁹⁴ Mohammad Hashim Kamali, *Qawa'id Al-Fiqh: The Legal Maxims of Islamic Law*, The Association Of Muslim Lawyers, U.K., 1998; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p. 369-382; Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.150-153. Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.22-36

²⁹⁵ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.3

²⁹⁶ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.23-25

“The maxim “matters will be judged by their purposes” does not signify that good ends justify evil means. According to Islamic law, the means and the ends must both be legitimate. It does emphasize, however, that laudable means are not laudable in and of themselves. They must be consciously directed toward their purposes.”²⁹⁷

“Ibn Taymiyya indicates that the scope of this maxim includes the moral responsibility that persons and groups bear for the unintended consequences of potentially detrimental actions when those consequences are predictable and could have been avoided. The Companion Samura ibn Jundub had an obese son, who would not follow his advice to eat in moderation. The Prophet indicated to Samura that if his son did not control his eating habits and died from obesity, his death would be tantamount to suicide.”²⁹⁸

“The Armistice (or treaty) of *Hudaybiyya*, which the Prophet concluded with the Meccan idolaters in the sixteenth year of his prophecy, provides a useful illustration of how matters can only be fully evaluated in the context of their purposes and outcomes. The precedent set by this accord contrasts sharply with the human tragedy common to many armed conflicts when resistance and intransigence become ends in themselves and prevail against reason, peace, and the preservation of public welfare.”²⁹⁹

“As much as any other operational mechanism, the maxim “matters will be judged by their purposes” constitutes a clear directive that Muslims live Islam with purpose. It sets a standard by which present activities in the Muslim community must be reassessed and future undertakings planned and carried out.”³⁰⁰

Sources of the maxim:

- Narrated by ‘Umar ibn Al-Khattab, “Actions are judged by their intentions...”³⁰¹

²⁹⁷ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.24

²⁹⁸ Ibn Taymiyya, *Al-Qawā’id al-Fiqhiyya*, 122, cited in Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.24

²⁹⁹ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.25

³⁰⁰ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.25

³⁰¹ *Sahih al-Bukhari*, n. 1; *Sunan Abu Dawud*, no. 2203; *al-Mu’jam al awsat*, no.40, *al-Sunan al-Sugra*, no, 2

- Narrated by Anas, “There are no deeds to those who have no intention.” (Bayhaqi)

Examples of application:

- Killing a person intentionally or unintentionally
- Keeping lost property for safe-keeping or for oneself
- Giving money as charity or as a bribe

Example of a principle based on this maxim:

- In contracts, liability is decided on the basis of intention and meaning and not on the basis of words and forms.

2. “Certainty is not overruled by doubt” (*Al-yaqinu la yazulu bish-shakk*)

This maxim means that knowledge based on valid experience and strong evidence must not be overturned by weaker considerations. It embodies the principle in the Qur’anic verse: “And do not follow that of which you have no true knowledge” (Qur’an 17:36).

Permissibility is the natural state and that is certain. This will, therefore, prevail until there is evidence to warrant a departure from that position. This maxim is based on a general reading of the relevant evidence in the *Qur’an* and *Sunnah*. From numerous verses of the *Qur’an* and the *hadith*, it is understood that people are allowed to utilise the resources of the earth for benefit, and that unless something is specifically declared forbidden, it is presumed to be permissible. A Muslim’s decisions must be guided by evidence and proof, and not by unfounded speculation and superstition.

Ultimately, the maxim “certainty is not overturned by doubt” expresses and “embodies the Islamic conviction that truth, as varied as its paths are, is not a function of arbitrary Will or subjective perceptions and must be discerned through objective criteria.”³⁰²

One of the most important applications of this maxim is in “**the presumption of continuity**” (*istishāb*) – discussed in Lesson 13. “The presumption of continuity holds that things must be presumed at present to remain in their former states until the contrary is

³⁰² Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.26

proven. Here again, “certainty” does not just apply to categorical knowledge but takes in matters of presumptive authority or strong conjecture. Even though a reasonable opinion may not be conclusive, it must be treated as if it were conclusive until the contrary is demonstratively proven.” Consequently, in its application, the maxim “certainty is not overturned by doubt” requires “that reasonable and well-established convictions be respected and not disregarded unless there is stronger evidence to the contrary.”³⁰³

According to Umar Faruq Abd-Allah:³⁰⁴

“Like many other legal systems, Islamic law upholds the principle that people are innocent until proven guilty. For Muslims, **the presumption of innocence** is a corollary of “certainty is not overturned by doubt.” More specifically, the presumption of innocence is a version of the presumption of continuity, which falls under the core maxim. The Islamic revelation teaches that human beings were created in a state of natural innocence and basic goodness. Their original condition of innocence makes guilt the exception to the rule. Therefore, people must be presumed to remain at present in their former state of innocence until the contrary is proven. Likewise, the reputations of people must be defended against rumors unless valid evidence proves them true.

“Another common application of “certainty is not overturned by doubt” is **“the presumption of permissibility.”** The presumption of permissibility holds that things must be presumed to be permissible unless the contrary is proven. Ibn Taymiyya asserts that none of the early authorities of Islamic law is known to have questioned the validity of the presumption of permissibility.³⁰⁵ Another closely related maxim holds that things must be regarded as permissible unless proven harmful. A similar maxim, “the presumption of cleanness,” states that all things will be presumed to be ritually clean (*tāhir*) unless the contrary is proven.³⁰⁶ These and related maxims are based on the Islamic belief that the world was created for human stewardship. Thus, the world and

³⁰³ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.26

³⁰⁴ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.26-27

³⁰⁵ Ibn Taymiyya, *Al-Qawā'id al-Fiqhiyya*, 217. Cited in Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.51.

³⁰⁶ See al-Nadawi, *Al-Qawā'id wa al-Dawābit*, 60. Cited in Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.51.

all that it contains are generally good, beneficial, and ritually clean. As a natural consequence, permissibility is the rule, and impermissibility, harmfulness, and ritual uncleanness are exceptions.

“The presumption of permissibility is crucial for the personal growth and community development of Muslims in the United States. Some Muslims regard Islam as little more than a list of do’s and don’ts, and, generally, the don’ts outnumber the do’s. When Islamic identity is behaviorally defined in this fashion, it fosters a psychology permeated with debilitations, inhibitions, and narrow cognitive frames; prohibition is made Islam’s default position, and the religion is given the appearance of permitting very little and prohibiting everything else.

“The presumption of permissibility emphasizes that the reverse is true; Islam’s real default position is one of general permissibility with an affirmative attitude toward the world. The basic rule of general permissibility does not mean that the clear prohibitions of Islamic law are discarded. In fact, it lays stress on the fact that prohibitions in Islam are grave matters and must not to be taken lightly. Because prohibitions are grave matters, they demand cogent proof based on sound knowledge, not on hearsay, misgivings, or inhibitions. Ibn Taymiyya adds in his discussion of the presumption of permissibility that it is reprehensible for a Muslim to be preoccupied with the minutiae of what may or may not be forbidden or to be obsessed with constantly asking about them.³⁰⁷

Sources of the maxim:

- *“Most of them only follow conjecture (zann), and surely, conjecture can be no substitute for the truth...”* (Qur’an 10: 36)
- *“He it is Who has created all that is in the earth for your benefit.”* (Qur’an 2:29)

³⁰⁷ Ibn Taymiyya, *Al-Qawā'id al-Fiqhiyya*, 206, 211-18. Cited in Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.51.

- *“Are you not aware that God has made subservient to you all that is in the heavens and all that is on earth, and He has lavished upon you His blessings, both outward and inward?”* (Qur’an 31:20)
- *“And We said, “O Adam, dwell together with your wife in this garden, and eat freely thereof, both of you, whatever you may wish; but do not approach this one tree lest you become wrongdoers.”* (Qur’an 2:35)
- *“God the Almighty has laid down religious duties, so do not neglect them; He has set boundaries, so do not overstep them; He has prohibited some things, so do not violate them; and about some things He was silent – out of compassion for you, not forgetfulness – so seek not after them.”* (Daraqutni, Tirmidhi, Ibn Maja and Hakim)
- *“If any of you feels anything in his or her stomach, and he is confused of whether anything has come out of it or not, he should not go out of the mosque unless he hears any sound or gets any smell.”* (Sahih Muslim)
- See also Qur’an 16:88; 5:101-102; 5:3

Examples of applications:

- Ablution is not broken on the basis of doubt but on certainty – sound, smell, etc.
- People are innocent until proven guilty
- People are free of responsibility unless proven otherwise
- A guardian is responsible for his ward unless proven otherwise
- Foods and drinks and other substances are all pure and permissible to use until proven prohibited

Principles based on this maxim:

- *“The norm in regard to things is that of permissibility”* (*Al-aslu fil-ashyaa’ al-Ibahah*).
- *“The norm (of Shari’ah) is that of non-liability”* (*Al-aslu baraa’ah adh-dhimmah*).

- “The norm is that the *status quo* remains as it was before” (*Al-aslu baqaa’u ma kaana ‘ala ma kaana*) ...unless it is proven to have changed.

3. “Harm must be removed” (*Ad-dararu yuzal*)

The purpose (*maqasid*) and essence of Islam is to secure benefits (*maslahah*) and ward off detriments and harm (*darar* or *mafsadah*). By only mentioning harm and not benefit, the wording of this maxim emphasises the priority of removing harm, as the imperative to ward off detriments takes priority over the acquisition of benefits when the two are mutually incompatible. The concept of benefit is therefore implicitly understood in this maxim. Omission of the word “benefit” not only emphasizes the importance of warding off harm, it implies that the acquisition of real and lasting benefits is not possible until harms are removed first.³⁰⁸

This purpose-oriented and priority-setting maxim “harm must be removed” obliges Muslims, in the name of their religion, to identify harms and remove them. It leaves Muslims no justification for ignoring or tolerating harm and injustice in their midst whether done to humans, animals or the environment. By emphasizing the necessity of removing harm, the maxim grants priority to the victims of harm, injustice, and oppression. The right of victims is always legitimate, and the harm that afflicts them must be redressed. In the Prophetic law, all that is harmful, from harm’s greatest to its least manifestations, is unacceptable and must be removed.³⁰⁹

Many rulings that are based on the “safety-net” tools (*maslahah*, *istihsan* and *sadd al-dhari’ah*) are also manifestations of the application of this maxim.³¹⁰

³⁰⁸ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.29

³⁰⁹ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.29

³¹⁰ See Lesson 19 for discussion on the “Safety-net Tools”.

Sources of the maxim:

- *“Do not hold your Wives in bondage, seeking to harm them; that would be transgression”* (Qur’an 2:231).
- *“No woman bearing a child shall be caused harm because of her child, nor shall any father to whom a child is born be caused harm because of his child.”* (Qur’an, 1:233).
- *“And make not your own hands contribute to (your) destruction.”* (Qur’an 2:195)
- *“Harm should not be inflicted nor reciprocated.”* (Ibn Majah, Malik, Al-Hakim, Al-Bayhaqi and Al-Daraqutni)
- *“Harm will not be removed by a similar harm.”* And the Prophet taught: *“Fulfill the trusts that you have been given; do not deceive a person who has deceived you.”*³¹¹

Examples of applications:

- Prohibition of a victim taking law into her own hands to avoid misappropriation of justice or vendetta.
- Penalties for any rules or laws that protect from harm, such as breaking traffic rules, causing suffering to animals, environmental laws, etc.
- Removing the great harm caused by the difficulty many young people face in finding suitable spouses. So also the harms of dysfunctional marriages and domestic abuse.
- It harms the community when solutions are not found for disadvantaged people who have no access to good education, cannot find adequate employment, or whose communities lack viable economic infrastructures.
- Removing the harms caused by various forms of religious extremism, and also helping avert the potential harms that arise from dehumanization and misinformation. This also extends to various forms of social phobia, including racism, islamophobia, etc.

³¹¹ Cited in Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.29

Principles based on this maxim:

- “Harm must be eliminated but not by means of another harm” (*Ad-dararuyuzalualakin la bi-darar*)
- “Harm is not eliminated by another (similar) harm” (*Ad-dararu la yuzalu bid-darar*).
- “A specific harm is tolerated in order to prevent a more general one” (*Yutahammal ad-darar al-khaas li-daf’al-darar al ‘aam*). Also, “To repel a public damage, a private damage is preferred”.
- “Harm is eliminated to the extent that is possible” (*Ad-dararuyudfa’u bi-qadr al-imkaan*)
- “A greater harm is eliminated by means of a lesser harm” (*Yuzal ad-darar al-ashaddu bid-darar al-akhaff*). Also, “When forced to choose between evil alternatives, the lesser evil must be sought”.
- “Prevention of evil takes priority over the attraction of benefit” (*Dar’ al-mafasidawla min jalb al-masalih*).
- “Necessity makes the unlawful lawful” (*Ad-daruratu tubih al-mahzuraat*).
- “Necessity is measured in accordance with its true proportions” (*Ad-daruratu tuqaddaru bi-qadriha*).

4. “Hardship begets facility” (*Al-mashaqqah tajlib al-taysir*)

To understand and appreciate this maxim, it is necessary to know that the word “hardship” used in it is not the same as “difficulty.” Unlike hardship, difficulty is not necessarily bad. Success in life usually does not come without difficulty and hard work – “no pain, no gain!”. Moral responsibility (*taklif*), which is the basis of Islamic religious obligation,

literally means in Arabic “imposition of a heavy burden” due to the fact that acts of worship and other religious duties require some degree of difficulty.³¹²

Hardship, as referred to in this maxim, excludes beneficial difficulty like that required for meeting obligations, training, study, work, and worship. Islam places high value on purposeful exertion but requires the alleviation of detrimental difficulty or hardship. The preceding maxim, “harm must be removed,” emphasizes elimination; harm must be eliminated, not necessarily replaced with something else. The focus of this maxim is different; hardship must not just be eliminated; it must be replaced with something better. “Hardship must be alleviated” often requires the creation alternatives, because alternatives are the means by which alleviation takes place. Taken together, both maxims testify to Islam’s commitment to reasonable norms that are free of harm and filled with as much benefit as possible.³¹³

Also, while it may sometimes be difficult or even impossible to remove or eliminate certain forms of harm and hardship, it may still be possible to alleviate the effect of hardship and facilitate some degree of relief or ease (*taysir*) through concessions and allowances (*rukhas*) to lighten hardship. This maxim “hardship must be alleviated” also sets a critically important standard for new or lapsed Muslims; only the most basic obligations should be expected of them, and the transition should be gradual and undemanding.³¹⁴

Unfortunately for some Muslims, Islam does not seem authentic if it is not hard. Occasionally, they adopt unnecessarily rigorous positions that push their psyches to the breaking point. Yet the Prophet made it clear that Islam is a religion of ease and that suffering for the sake of suffering is not laudable and does not please God.³¹⁵

³¹² Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.30

³¹³ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.30

³¹⁴ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.32

³¹⁵ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.30

Sources of the maxim:

- *“God intends for you ease and He does not intend to put you in hardship.”* (Qur’an 2:185)
- *“God does not intend to inflict hardship on you.”* (Qur’an 5:6)
- *“He did not make any difficulty for you regarding the religion (of Islam).”* (Qur’an 22:78)
- *“Allah does not give anyone (legal) responsibility for anything except what is within his capacity.”* (Qur’an 2:286)
- Hadith: “You have not been sent as those who have been given hardship. Rather, you have been sent as those who have been given ease or facility.” (Sahih al-Bukhari and Muslim)
- Hadith: “Certainly, the best part of your religious practice is what is easiest for you.” The Prophet(p) is also reported as having said: “If I command you to do something, do of it what you are capable of doing.”³¹⁶
- Hadith: “Surely Allah introduced the din as ease, full of kindness, and wide. He did not make it narrow.” (Tabarani)
- A’isha said: “Whenever the Messenger of Allah was given a choice between two things, he chose the easier one unless it was a sin.” (Sahih al-Bukhari and Muslim)
- Additional evidences cited for this maxim or principle come from the concept of *Rukhsah* or concession, such as shortening and combining prayers when travelling, payment of expiation (*kaffarah*) for fasting missed due to age or illness, etc.

Examples of applications:

- Taking essential medicine even if it contains alcohol or pig gelatin.
- Traditional methods of determining prayer times are no longer easy in some societies; in some cases, they have even become impossible. To alleviate this hardship, most Muslims today rely on prayer timetables.

³¹⁶ Cited in Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.30

- When flying, it is widely regarded as permissible to pray in one's seat by making minimal gestures indicative of prayer and without needing to face toward Mecca.
- Given the length of urban commutes in some large cities, some scholars allow commuters to combine prayers, although the distances they drive may fall short of the definition of travel in Islamic law.
- Suspending certain prescribed (*hadd*) punishments due to economic hardships, and finding excuses to avoid the severe "fixed" (*hadd*) punishments, as advised by the Prophet(p).
- Taking easier or more facilitating opinions from other Schools of Juristic Thought and scholars if they were more in line with the objectives (*Maqasid*) of *Shari'ah* in a particular situation.

Principles based on this maxim:

- "Necessity renders prohibited things permissible"
- "Latitude should be afforded in the case of difficulty"

(The gravity of the necessity or difficulty will determine the degree and conditions for facilitation. Note that other maxims are used to restrict the use or abuse of these maxims.)³¹⁷

5. "Custom is a basis of law" (*Al-'adah muhakkamah*) ³¹⁸

"The Prophet's attitude toward the cultural norms of the Arab tribes and other ethnic groups constitutes a major precedent and a basic standard in Islamic law. Because the Prophet gave broad endorsement to diverse cultural conventions and did not alter them except when necessary, Abū Yusuf, the principal student of Imam Abū Hanifa, regarded

³¹⁷ Mohammad Akram Laldin, *Introduction to Shari'ah and Islamic Jurisprudence*, CERT, Kuala Lumpur, 2nd ed., 2008, p.144

³¹⁸ Also rendered by some as "Custom shall have the power of law", or "custom is made the arbiter". See, Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.139.

Islam's openness toward other cultures as the Prophet's Sunna. Abu Yusuf's position contrasts sharply with certain Muslims today who regard the Sunna (narrowly defined as certain details of dress and personal behavior) as a substitute for culture.³¹⁹

The Prophet set the precedent of affirming cultural differences and made it clear that, for non-Arabs, entering Islam did not require them to give up their own cultural norms for those of the Arabs.³²⁰

This maxim, "custom has the weight of law" cannot however be invoked to repeal or overlook what is clearly obligatory (*fard/wajib*) or prohibited (*haram*) from the texts of Qur'an or Sunnah, and the Shari'ah categorically repudiates harmful, immoral and degenerate customary practices that contradict its goodly purposes (*maqasid*).³²¹

The word "custom" (*'āda*) as used in the maxim "custom has the weight of law" therefore refers to acceptable cultural norms. Jurists define their usage of the word "custom" as "matters that are firmly established in practice and frequently repeated in people's lives and acceptable to sound natures (*al-tibā' al-salīma*)."³²² Reference to "sound natures" is linked to the Islamic belief that human beings are created with sound natures; humans are intrinsically good and endowed with basic intuitive knowledge of God, good and evil, benefit and harm. In a normative state, human beings adopt cultural norms suitable for themselves and the particular circumstances, times, and places in which they live. Thus, the basic purpose of cultural conventions is to obtain benefits and ward off harms to the furthest extent possible in widely divergent contexts. From the perspective of Islamic law, the nature of indigenous cultures and subcultures is fundamentally linked to the wellbeing of the social groups that have adopted them. For this reason, Muslim jurists regard Islam's endorsement of diverse cultural norms as an instance of its overriding commitment to acquiring benefits and protecting from harms.³²²

³¹⁹ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.32

³²⁰ Umar Faruq Abd-Allah, *Islam and the Cultural Imperative*, A Nawawi Foundation Paper, 2004, p.5.

³²¹ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.34

³²² Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.33

Islamic legal theory (*Usul al-Fiqh*) regards sound cultural norms as constituting an independent and authoritative source of Islamic law.³²³ The noted Hanafi jurist al-Sarakhsi stated: “Whatever is established by good custom is equally well established by sound legal proof.” Al-Tusūlī, a prominent Maliki judge and legal scholar, wrote: “It is obligatory to let people follow their customs, usages, and general aspirations in life. To hand down rulings in opposition to them is gross deviation and tyranny.”³²⁴

Changing customary conventions unnecessarily is detrimental, because of the strong connection between customs and societal needs. When unhealthy customs must be altered or repealed, the process requires wise strategies and must be given time. Here again, the Prophet’s example sets the precedent; he brought his Companions into full compliance with Islamic norms gradually through a process that lasted more than two decades.³²⁵

Some Muslims challenge the validity of indigenous customs by citing the Hadith mentioned earlier: “Whoever imitates (*tashabbaha*) a people belongs to them.” As noted, the Hadith condemns the servile imitation of others; it does not condemn healthy cultural interaction or the mere act of resembling (*tashābaha*) other people. The value of such interaction is especially clear when it is done for laudable reasons like living with others harmoniously and building bridges of understanding and cooperation. Furthermore, it is indisputable in the light of a body of authentic Hadith that the Prophet himself often wore various types of non-Muslim clothing that were given to him as gifts from Byzantium, Yemen, and other distant regions.³²⁶

The presumption of permissibility derived from the 2nd maxim above also applies to indigenous customs; customs too must be presumed acceptable until proven otherwise. A relevant maxim states: “Permissibility is the basic rule in customs” (*al-asl fī al-‘ādāt al-*

³²³ See Lesson 12 on ‘*Urf* and ‘*Aadat*.

³²⁴ Umar Faruq Abd-Allah, *Islam and the Cultural Imperative*, A Nawawi Foundation Paper, 2004.

³²⁵ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.33

³²⁶ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.33

ibāha). As before, the burden of proof that a particular customary convention is impermissible falls exclusively on those who repudiate it, not on those who affirm it. Nevertheless, in borderline cases, the law prefers to err on the side of lenience. The applicable maxim in this regard states: “The basic rule in customs is exemption” (*al-asl fi al-‘ādāt al-‘afw*), meaning that they are exempt from blame.³²⁷

The maxim “custom has the weight of law” affirms that Islam is not culturally predatory, and it teaches Muslims to look upon all cultural heritages with an open mind, especially those where they live and to which they belong.³²⁸

Sources of the maxim:

- The opinion of the companion, Abdullah ibn Mas‘ud, who said, “What the Muslim community agrees upon to be good is good in the eyes of God”.
- “Keep forgiveness, enjoin ‘*Urf* and turn away from the ignorant” (Qur’an 7:199). Many scholars of the Qur’an (*Mufasssirun*) suggest that the meaning of ‘*Urf* in this verse is synonymous to *Ma’ruf* which means anything that is good. Therefore the custom of a people shall be considered in making legal judgements.³²⁹
- Hadith reported by A’isha, in which Hind the wife of Abu Sufyan complained to the Prophet that her husband was miserly and did not give adequate maintenance for her and her children, and the Prophet (ﷺ) said; “Take from his property what is customary (*ma’ruf*) which may suffice you and your children”. Some commentators of the *Sunnah* suggested that this hadith indicates the important role of custom, and that it should be relied upon in matters where the *Shari’ah* did not give exact details.³³⁰

³²⁷ Ibn Taymiyya, *Al-Qawā'id al-Fiqhiyya*, 226-28, cited in Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.34

³²⁸ Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.32

³²⁹ Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.151.

³³⁰ Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, p.151., p.152, citing other authorities.

Examples of applications:

- Customary greetings and insults are regarded as so in *Shari'ah*
- Local financial instruments and currencies are recognized.
- The meanings of cultural idiomatic expressions are recognized over their literal meanings (e.g. "He wanted to kill two birds with one stone" is understood to mean that the subject did not actually kill two birds with a stone.)
- Professional jargon is recognized.

Principles based on this maxim:

- "What is determined by custom is tantamount to a contractual stipulation" (*Al-ma'rufu 'urfankal-mashrutushartan*)
- "In the presence of custom, no regard is given to the literal meaning of things"
- "A matter recognized by merchants is regarded as being a contractual obligation between them"
- "A matter established by custom is like a matter established by law"
- "It cannot be denied that with a change of time, the requirement of the law changes"

DISCUSSION QUESTIONS:

1. What is the difference between *Usul al-Fiqh* and *Qawa'id Fiqhiyyah*?
2. Use some metaphor to distinguish *Usul al-Fiqh* from *Qawa'id Fiqhiyyah*.
3. Why are the *Qawa'id al-Fiqhiyyah* important in *Ijtihad*?
4. List the 5 major legal maxims of Islamic jurisprudence.

5. What evidence from the Qur'an and/or *Sunnah* is there for the establishment or justification of
 - a) Maxim 1:
 - b) Maxim 2:
 - c) Maxim 3
 - d) Maxim 4:
 - e) Maxim 5:
6. Give at least 2 examples of cases where each maxim is applicable.
7. List other maxims or principles that are based on each of the 5 major maxims.
 - a) Maxim 1
 - b) Maxim 2
 - c) Maxim 3
 - d) Maxim 4
 - e) Maxim 5

LESSON 31: A FUNDAMENTAL MAXIM FOR *USUL AL-FIQH*

For the purpose of this course, and so as to be explicitly clear regarding evidence for legal liability (*Haram* and *Fard /Wajib*), the most relevant maxim is: **“Certainty is not overruled by doubt”** and its application in ascertaining whether something is permissible or not from the text.

In most questions regarding what is permissible (*halal*) or prohibited (*haram*), the first and probably the most relevant sub-maxim or principle is: **“The norm with regard to things is that of permissibility”** (*Al-asl fi al-ashyaa’ al-Ibahah*).³³¹

What this principle ensures is that certainty and not doubt is used to determine the position for attributing sin (*ithm*) to the commission or omission of *haram* or *fard /wajib* actions respectively. It guides the jurist towards clarity regarding whether the matter under consideration is authentically discussed in clear terms in the text of the Qur’an or Sunnah, or not. This maxim enables the scholar to know whether there is a clear basis for speaking in the name of God or His Prophet (ﷺ), or whether there is the need to resort to other rationalistic and more speculative evidence. If there is silence in the text then it becomes difficult for the scholar to confidently speak with divine authority. They may have to resort to the *original premise of permissibility of all things* (in the absence of a clear prohibition), or if they feel there

³³¹ Kamali, Mohammad Akram Laldin, *Introduction to Shari’ah and Islamic Jurisprudence*, 2nd ed. CERT, Kuala Lumpur, 2008, Tariq Ramadan, *To Be a European Muslim*, The Islamic Foundation, Leicester, 1999, Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam*, IIFSO, Salimiah, 1992, p. 14-18; Mohammad Hashim Kamali, *Qawa’id Fiqh, The Legal Maxims of Islamic Jurisprudence*. p.2; Abu Sulayman, ‘Abd al-Wahhab, “An-Nazariyyah wal-Qawa’id fi al-Fiqh al-Islami” in *Majallah Jamai’ah al-Malik ‘Abdal-‘Aziz*, No.2, May 1978, p.53; Shihab ad-Din al-Qarafi, *Kitab al-Furuq*, Matha’ah Dar Ihya al-Kutub al-‘Arabiyyah, Cairo, vol. IV, p.40; see also ‘Jamal al Din Atiyyah, *Al-Tanzir al-Fiqhi*, p. 208; Abdurahman bn Abu Bakr al-Suyuti, *Al-ashbah wa al-Nazair*, vol.1, p.107; Badruddeen Muhammad bin Abdullahi Al-Zarkashi, *Al-Bahr Al-Muheet Fi Usul Al-Fiqh*, Dar al-Kutub al-‘Ilmiyyah, Beirut, 1421 AH, vol.1, p.126; Ibrahim bn Ali bin Yusuf al-Shirazi, Dar al-Fikr, Damascus, 1403AH, vol.1, p.535; Muhammad Amir, *Taysir Al-tahrir*, Dar Nashr, vol.2, p.247; Abdullah bin Yusuf al-Juda’i, *Taysir ‘Ilm Usul al Fiqh*, p.34, 69, 71 and 72; Abdullah al-Fauzan, *Khulasah al-Usul*, p.7; al-Zarqa, *Sharh al-Qawa’id al-Fiqhiyyah*, p.299; Muhammad bin Hassan al-Dadaw, *Sharh alwaraqaat*, p.76; Abdulkareem al-khudair, *Sharh Matn al Waraqaat*, p.410; Abdulwahab Khallaf, *‘Ilm Usul al-Fiqh*, Maktabah al-Da’wah, p.91; Muhammad Amin Ihsan Almujaiddi Albarkati, *Qawa’id al-Fiqh*, Dar al-Nashr, p.14; Zakariyya bin Gulam Qadir Albakistani, *Usul al-Fiqh ‘Ala Manhaj Ahl al-Hadith*, Dar al-Kharraz, 1423 AH., p.116; Mashur bin Hasan Al-Salman, *Al-Tahqiqat wa al-Tanqihat al-Salafiyyah ‘ala Matn al-Waraqaat*, Dar Imam al-Malik, U.A.E, 1426AH, p.584-589.

is a need, to resort to the various tools of *ijtihad* as used by the School of juristic Thought or *Mujtahid*.

As discussed earlier, this maxim is based on various verses of the Qur'an and Hadith, including: "(He)has created all that is in the earth for your benefit" (Qur'an 2:29)³³², and also the *hadith* that states: "Whatever God has made *halal* is *halal* and whatever He has rendered as *haram* is *haram*, and all that over which He has remained silent is forgiven". (Ibn Majah)

There appears to be a general consensus (*ijma'*) among scholars and their Schools of Juristic Thought (with some apparently slight modifications from some in the Hanafi School³³³) that this maxim or principle of general permissibility essentially applies to all non-ritual worldly social transactions, and mundane issues (*mu'amalat*) or customary practices (*adaat*).³³⁴

This maxim is stated or rephrased below in a number of ways so as make clearer its meaning and implications:

- **"Everything is *halal* except what is *haram*" from a clear and explicit text (*nass qat'i thubut*) of the Qur'an and authentic Sunnah.**³³⁵
- **Whatever is not *haram* is in fact *halal*.**³³⁶

³³² Other verses include, Qur'an 7:30; 6:146; 6:152; 7:31, etc.

³³³ The principle is accepted by the Hanafis as long as the *mu'amalat* is wholesome, of benefit or not harmful in light of (Qur'an 2:28). See more on this in Imran Khan Nyazee, *Theories of Islamic Law*, International Institute of Islamic Thought, Islamabad, 1994. See also Ahmad Abdelaziz Yacoub, *The Fiqh of Medicine*, Ta-Ha Publishers, London, U.K., 2001, p.314-318, and especially p.316, where he quotes Al-Hidaya, a classical Hanafi text which states that "permission is the rule".

³³⁴ Most of the common exceptions to this principle which are raised by some scholars when applied to "meats" (*luhum*) and "sexual relations" (*abda'*), etc. are a subject of disagreement among the scholars and appear to be mostly semantic and of no major practical consequence in their final outcome. And Allah knows best! The more significant difference among scholars in the application of this principle of general permissibility is on the exception of devotional worship (*ibadat*) as discussed in Lesson 32.

³³⁵ Ibn Muflih, (quoting Ibn Taimiyyah), *Al-Adab al-Shar'iyyah wa al-Minah al-Mar'iyyah*, Beirut, 1419 AH, vol.1, p.137.

³³⁶ Tariq Ramadan, *To Be a European Muslim*, The Islamic Foundation, Leicester, 1999, p.64; Zakariyya bin Ghulam Qadir Al-Pakistani, *Usul al-Fiqh ala Manhaj ahl al-Hadith*, p.116.

- ***Halal* is the default verdict for everything, in social transactions or *mu'amalat***³³⁷
- The assumed verdict (*fatwa*) for everything is that it is *halal*, in the absence of clear textual evidence to the contrary.
- ***HARAM* (i.e. what is sinful if committed) AND/OR *FARD /WAJIB* (i.e. what is sinful if omitted) REQUIRES TEXTUAL EVIDENCE! Silence in the text does not automatically imply a prohibition.**
- ***Halal* (*mubah* or *ja'iz*) – permissibility - DOES NOT REQUIRE TEXTUAL EVIDENCE!**
- The silence or ambiguity in the text, then, is the sphere of *ijtihad*, “which permits *fiqh*, within the social affairs (*mu'amalat*) to be in constant development, evolution and formulation”.³³⁸
- Silence in the text therefore means:
 1. A thing is *halal* (*mubah*) by default,³³⁹
 2. Opportunity for *ijtihad* (deductive reasoning by *mujtahid*)³⁴⁰ especially if there is a valid concern that any of the objectives (*maqasid*) of Shari'ah would be threatened by the silence on it.

IN SUMMARY:

- In *Mu'amalat*, Whatever is not *haram* is in fact *halal* !!!
- Silence in the text means *halal*, or an opportunity for *ijtihad* (deductive reasoning by *mujtahid*)
- The burden of proof that a particular mundane custom (*'Urf*) or social transaction (*mu'amalat*) is impermissible falls exclusively on those who reject or repudiate it, not

³³⁷ Ibn Taimiyyah, *Al-Qawa'id al-Nuraniyyah al-Fiqhiyyah*, p.112-113, cited in Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam*, Al-Birr Foundation, London, 2003 p.5-6; see also *What is Islamic Culture?*, the Da'wah Institute of Nigeria, Islamic Education Trust, Minna, 2009, p. 4-5.

³³⁸ Tariq Ramadan, *To Be a European Muslim*, The Islamic Foundation, Leicester, 1999, p.75

³³⁹ Ibn Taimiyyah, *Majmu' al-Fatawa*, Medina, 1416 AH, vol.21, p.538

³⁴⁰ Tariq Ramadan, *To Be a European Muslim*, The Islamic Foundation, Leicester, 1999, p.75

on those who affirm it. Nevertheless, in borderline cases, the law prefers to err on the side of lenience and compassion.³⁴¹

DISCUSSION QUESTIONS:

1. What is the textual evidence or justification for the maxim: “the premise of things is permissibility”?
2. Explain what you understand by the maxim: “the premise of all things is permissibility”?
3. What are the implications of silence in the text of the Qur’an and *Sunnah* on any issue related to social transactions (*mu’amalat*)?

³⁴¹ Ibn Taymiyya, *Al-Qawā'id al-Fiqhiyya*, 226-28, cited in Umar Faruq Abd-Allah, *Living Islam with Purpose*, Nawawi Foundation, 2007, p.34

LESSON 32: DIFFERENCES OVER EXCEPTIONS -*BID'AH*

Possible Exception to the Rule of General Permissibility: The case of acts of devotional or ritual worship (*ibadat*)

As mentioned earlier, almost all scholars apply the Principle of General Permissibility (“the premise for things is permissibility” – i.e., “*everything is permissible except what is prohibited*”) as a rule to all issues under the category of *mu'amalat*. Depending on the analysis of evidence or proofs (*adillah*) these new practices and innovations in *mu'amalat* (and *adat*) could be classified or judged according to any of the 5 (or 7) standard ethical rulings or value-judgements (*ahkam*) of Shari'ah – *fard*, (*wajib*), *mustahab*, *mubah*, *makruh*, (*makruh tahrimi*), and *haram* – as discussed earlier in this material.

Regarding the application of this principle of permissibility (and hence of innovation – *bid'ah*) to the sphere of *ibadah* or *deen*³⁴², there appear to be 2 major opinions or perspectives, with some diversity, nuances and qualifications within each of these major perspectives.³⁴³

Opinion 1: *Deen* as an Exception to the Rule of Permissibility

Many scholars³⁴⁴ from the various schools of juristic thought apply the principle of general permissibility to only *mu'amalat* and *adat*, and not to “religion” (*deen*) - ritual acts or devotional worship (*ibadat*) and creed (*aqidah*). This opinion holds that in issues of *deen* or *ibadah* the exact

³⁴² As opposed to *dunya* or “worldly” affairs – i.e. *mu'amalat* or *adat*.

³⁴³ These nuances, and the differences over the concept of *bid'ah* are not the main concern of this present work. For a more detailed analysis of various opinions among scholars regarding innovations (*bid'ah*) in worship or devotional (*ibadat*) issues, and a discussion on the “Descriptive Paradigm” represented by Imam Shafi'i's approach to *bid'ah*, and “Normative Paradigm” or approach of Imam Malik, see Aslam Farouk-Alli's “Translator's Introduction” to Muhammad Al-Ghazali, *Within the Boundaries of Islam: A Study on Bid'a*, Islamic Book Trust, Kuala Lumpur, 2010, p.xxxiii. For an even more in-depth study of these paradigms, see Raquel M. Ukeles, *Innovation or Deviation: Exploring the Boundaries of Islamic Devotional Law*, (Harvard University; PhD. Thesis), 2006, p.117-120.

³⁴⁴ This group is usually represented by the arguments of the Hanbali jurist Ahmad Ibn Taimiyyah (particularly in *Iqtida' al-Sirat al-Mustaqim li mukhalafat as-hab al-Jahim*) and the Maliki jurist Abu Ishaq Al-Shatibi (particularly in *Kitab al-I'tisam*).

opposite of the maxim or principle of permissibility applies: **“Everything is *haram* except what is *halal* (from the clear explicit text of the Qur’an or authentic Sunnah).”**³⁴⁵

According to Ibn Taimiyyah: “People's sayings and actions are of two kinds: acts of worship (*ibadat*) by which their religion is established, and customary practices (*adat*) which are required for day-to-day living. From the Principles of the Shari'ah, we know that acts of worship (*ibadat*) are those acts which have been prescribed by Allah or approved by Him; nothing is to be affirmed here except through the Shari'ah. However, as far as the worldly activities of people are concerned, they are necessary for everyday life. Here the principle is freedom of action; nothing may be restricted in this regard except what Allah has restricted...”³⁴⁶ Elsewhere he says, “The principle regarding *ibadat* is that there is no legislating for it except that which God legislated, and the principle regarding *adat* is that there is no prohibiting it except that which God prohibited.”³⁴⁷ Al-Shatibi defines *bid’ah* as “a way of innovation in religion that resembles the way of the Shari’ah and which is intended to be followed...”³⁴⁸ He says, “If this way of innovation belongs to *dunya* exclusively, it would not be a *bid’ah*”.³⁴⁹

In the view of those who hold this opinion, the Principle of Permissibility and hence of beneficial innovations and creativity, applies only to worldly (*dunya*) – mundane issues (*mu’amalat*) or customary practices (*adat*). It does not apply to “religion” or “devotional worship” (*deen*) – i.e., *ibadat* and/or *aqidah*.

Silence in the text of the Qur’an or Sunnah (or in practice of the Companions) related to *ibadat* or *deen* does not automatically imply permissibility or the possibility of *ijtihad* – it implies a prohibition. In other words, the absence of precedent in the practice of the *Salaf* is equivalent

³⁴⁵ Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam*, IIFSO, Salimiah, 1992, p.16-17; Jasser Auda, *Al-Maqasid al-Shari’ah: A Beginner’s Guide*, IIIT, London, 2008, p.13; Tariq Ramadan, *To Be a European Muslim*, The Islamic Foundation, Leicester, 1999, p.104, note 18.

³⁴⁶ Ibn Taymiyyah, *Al-Qawa'id al-Nuraniyyah al-Fiqhiyyah*, Maktabat al-Sunnah Al-Muhammadiyah, Cairo, 1951, pp.112

³⁴⁷ Ibn Taimiyyah, *Iqtida' al-Sirat al-Mustaqim li mukhalafat as-hab al-Jahim*, Vol.2, p.86. See also Abu 'Umar ibn 'Abd al-Barr, *Al-Istidhkar*, 5:153.

³⁴⁸ Abu Ishaq al-Shatibi, *Al-I'tisam*, Vol.2, p.19

³⁴⁹ Abu Ishaq al-Shatibi, *Al-I'tisam*, Vol.2, p.19.

to a prohibition. The application of the principle of general permissibility to *deen* only creates a blameworthy or heretical innovation - *bid'ah*.³⁵⁰

The technical definition of *bid'ah*, from the perspective of those who hold the opinion under consideration here, is a term that is not applied to innovations in *mu'amalat*.³⁵¹ It applies only to *deen* - *ibadah* or *aqidah*, and is never good irrespective of the motive.³⁵² This approach regards the idea of “good *bid'ah*” as a contradiction in terms. Acceptable innovations and creativity in *mu'amalat* and *adat* (or *dunya* matters) are usually regarded to as being part of “public interest” and “common good” (*maslaha*), or “juristic interest/discretion” (*istihsan*).

Holders of this view would therefore object to any form of collective *dhikr* after prayers (*salat*) if done as an act of *ibadah* since it was not done in the Sunnah. If the same action is done purely for the sake of teaching children or educating people on how to recite various forms of *dhikr* or *du'a*, as taught by the Sunnah, then it would be permissible, because teaching is *mu'amalat* and not *ibadah*. Similarly, fasting for a whole month outside Ramadan or for a whole week would be deemed objectionable as there is no text showing that the Prophet or his Companions did such an *ibadah*. The same position would be held regarding performing any form of special prayers for the dead a fixed number of days after the person's demise, and celebrating the Prophet's birthday (*Mawlid al-Nabi*), especially if viewed as a devotional act or similar to one.

While some of these scholars may not object to a person performing some devotional acts if they so please on an *ad hoc* basis, the moment these acts are given a regular or fixed time, place, number, unique manner of performance or wording, they would be regarded as *bid'ah*, even if (in the view of some scholars) they appear to be *mu'amalat*. The very fact that they are “ritualized” turns them into acts similar to *ibadat* and are thus treated as such.

³⁵⁰ The lexical meaning of *bid'ah* in the Arabic language is “novelty”, “innovation”, “creativity”, “newness” or “origination”. Its technical meaning however has been a subject of diverse opinions among Muslim scholars.

³⁵¹ Abu Ishaq al-Shatibi, *Al-I'tisam*, Vol.1, p.50.

³⁵² This paradigm or perspective of *bid'ah* has been described by some researchers as the “Normative Approach” to *bid'ah*. See Aslam Farouk-Alli's “Translator's Introduction” to Muhammad Al-Ghazali, *Within the Boundaries of Islam: A Study on Bid'a*, Islamic Book Trust, Kuala Lumpur, 2010, p.xxxiii. See also Raquel M. Ukeles, *Innovation or Deviation: Exploring the Boundaries of Islamic Devotional Law*, (Harvard University; PhD Thesis), 2006, p.117-120.

In fact, according to Ibn Taimiyyah, “*Shirk* enters into every devotional act (*ibadah*) that God does not permit.”³⁵³

From this perspective, all acts of *ibadah* should be left alone as they were by the Prophet (ﷺ) and his Rightly-guided Successors, without “excess baggage”. It holds that what the Prophet (ﷺ) left behind should be sufficient for all sincere believers; the *deen* is perfect and complete! Any addition to *ibadah* is superfluous and unnecessary even if it may be rationally justifiable. Opening the door to new “good *bid’ah*” is opening the door that leads to uncertainty, confusion, and unnecessary disagreement – where the harm to Islam and the Ummah is greater than any potential benefits. It is (in this view) better to shut the door on “good innovations” or creativity in *ibadah* so as not to blur the line between guidance and misguidance in *ibadat*.

The central problem with *bid’ah* from this paradigm appears to be that it represents a misguided attempt to gain closeness to Allah by means that Allah did not legislate.³⁵⁴

To these scholars, every innovation IN IBADAT or AQIDAH is misguidance!³⁵⁵

Opinion 2: *Deen* not an Exception to the Rule of Permissibility

Some other scholars³⁵⁶ make no distinction in the application of the principle of permissibility (and hence of innovativeness) to both *ibadat* and *mu’amalat*, so long as the contents and purpose is virtuous. Depending on the analysis of evidence or proofs (*adillah*), both *ibadah* and *mu’amalat* would be classified or judged according to the criteria of the 5 ethical rulings or value-judgements (*ahkam*) of Shari’ah.³⁵⁷

³⁵³ Ibn Taimiyyah, *Iqtida’*, Vol.2, p.86.

³⁵⁴ Aslam Farouk-Alli’s “Translator’s Introduction” to Muhammad Al-Ghazali, *Within the Boundaries of Islam: A Study on Bid’a*, Islamic Book Trust, Kuala Lumpur, 2010, p.xxxiii.

³⁵⁵ While all Muslims upheld the validity of the famous Hadith: “Every innovation is misguidance” (Abu Dawood, Tirmidhi), none understood it in such general terms as to abrogate the obligation of performing *ijtihad* and finding unique innovative solutions to new problems. See Abd-Allah Umar Faruq, *Innovation and Creativity in Islam*, Nawawi Foundation, 2006, p.8.

³⁵⁶ This group is usually represented most prominently by the Shafi’i jurists Al-‘Izz Ibn Abdulsalam (in especially *Al-Qawa’id al-Kubra*), Abu al-Qasim Abdul-Rahman Abu Shamah (in *Al-Ba’ith ‘ala inkar al-Bid’a wa al-Hawadith*), and Jalal al-Din al-Suyuti (in *Al-Amr bi al-Ittiba’ wa al-Nahy ‘an al-Ibtida’*).

³⁵⁷ It should be noted that while many scholars would define *bid’ah* as covering good and bad innovations in *ibadat* and *mu’amalat*, and some would re-classify these into further sub-categories, many of them would also

Acts of devotion (*ibadah*) not done by the Prophet or his companions, such as those mentioned above, which the group who hold the first opinion would regard as unacceptable *bid'ah* are regarded as “good *bid'ah*” (*bida' hasanah*) by this second group, if these acts do not contravene the Qur'an and Sunnah, and if the motives are virtuous.

A common evidence used to justify the idea that an innovation (*bid'ah*) could be applied to an acceptable act of worship (i.e. a “good *bid'ah*” in *ibadah*) is the fact that during his Caliphate, Umar bin Al-Khattab institutionalized the performance of regular congregational *tarawih* prayers in Ramadan, after which he remarked, “*What an excellent bid'ah this is!*”,³⁵⁸ in spite of it being an act of *ibadah*. This statement of Umar has been interpreted differently by various scholars. Some view Umar as having used the word *bid'ah* in its purely lexical or linguistic and not technical sense, and regard Umar's practice as part of the Sunnah, since the Prophet(p) is reported to have said, “*You must follow my sunnah and that of my rightly-guided successors. Hold to it and stick fast to it. Avoid innovation, for every innovation is a heresy, and every heresy is an error*”. Others however view Umar's statement as setting a precedent of a “good *bid'ah*”, and the linguistic with certain qualifications as being the technical meaning.³⁵⁹

According to Al 'Izz bin Abdulsalam, “*Bid'ah* is what was not practiced during the era of the Prophet, and it is divided into *wajib* (obligatory), *haram* (unlawful), *mandub* (recommended), *makruh* (offensive), and *mubah* (permissible).”³⁶⁰

In this opinion, the principle of general permissibility (i.e. *halal*) remains the default verdict for everything in *mu'amalat* and acts of worship (*ibadah*). Though treated with greater reservation, creativity and innovation in *deen* or *ibadat* are not regarded as automatically *haram* and blameworthy innovations or heresy (*bid'ah*) by default, if they do not contradict or contravene the Shari'ah and its major sources (or *adillah*).

regard most of the “bad innovations” as being innovations in *ibadat* and *aqidah*, and most of the “good innovations” as being those mainly in *mu'amalat*. Consequently, depending on the technical definition of *bid'ah* by an individual scholar, a particular act may be described by one scholar as a “good innovation” (*bid'ah hasanah*), by another as part of accepted “tradition” (*Sunnah*), and by yet another scholar as being part of “Public Interest” (*maslaha*).

³⁵⁸ Sahih al-Bukhari Vol. 3, No.227 in Alim

³⁵⁹ *Al-Mustadrak*, no.329; Al-Baihaqi, *al-Sunan al-Kubrah*, no. 20835; Ibn Majah, *Sunan Ibn Majah*, no. 42; *Musnad Imam Ahmad* no.17145; *Sunan al-Tirmidhi*, no.2676; *Sunan al-Darimi*, no. 95.

³⁶⁰ Al-'Izz bin Abdulsalam, *Qawa'id al-Ahkam fi Masalih al-An'am*. Dar al Ma'rif, Beirut, Lebanon Vol.2, p.208-209.

Imam Al-Suyuti says, “It has been clarified for you that the people (*qawm*) were wary of innovation, even if there was no harm lest they create something that was (harmful). And yet, novelties (*muhdathat*) occurred that do not clash with the law (*shari’ah*) and do not negatively affect it, and they did not see harm in doing them, but rather some of them said, ‘they are acts of drawing near to Allah (*innaha qurbah*)’, and this is correct, as it was related that the people used to pray during Ramadan individually...”³⁶¹

According to this opinion, the criteria for the assessment of *mu’amalat* are the same as that for assessing innovations in *deen* or *ibadat*. Only those innovations that contradict the Qur’an and Sunnah are blameworthy *bid’ah*.³⁶²

Consequently, regarding the celebration of the Prophet’s birthday (Mawlid al-Nabi), Al-Suyuti says: “The legal basis for the observance of the Prophet’s birthday – which constitutes a gathering of people, a recitation of appropriate portions of the Qur’an, the recounting of transmitted stories about the beginning of the Prophet’s life, peace and blessings be upon him, and the signs that occurred upon his birth, followed by a banquet that is served to them and from which they eat, whereupon they leave without doing anything else – is of the good innovations (*al-bid’ah al-hasanah*) for which one is rewarded because of the glorification of the position of the Prophet, peace and blessings be upon him, and the display of joy and delight on his noble birth.”³⁶³

These scholars however, unlike most (not all) of those from the earlier group, also apply the term *bid’ah* to cover innovations in mundane affairs (*mu’amalat*).³⁶⁴ ‘Aisha is reported to have said,

³⁶¹Al-Suyuti, *Al-Amr bi al-Ittiba’ wa al-Nahy ‘an al-Ibtida’*, p.36-37.

³⁶² Even though the main focus of even these scholars when addressing *bid’ah* was targeted to *ibadah* and *aqidah*, it was not exclusive of *mu’amalat*. (See Abd-Allah Umar Faruq, *Innovation and Creativity in Islam*, Nawawi Foundation, 2006, p.7)

³⁶³Al-Suyuti, *Husn al-Maqasid fi Amal al-Mawlid*” in *Al-Hawi li al-Fatawi* (Beirut, Dar al-Kutub al-Ilmiyyah, 1975, Vol.1, p.189. Some other scholars have understood the Mawlid celebrations as under the *mu’amalat* category - as an innovative customary (*adat*) celebration such as other birthdays, weddings, and graduation ceremonies - and not under *ibadat*.

³⁶⁴ Those scholars who included mundane affairs (*mu’amalat*) under the rubric of *bid’ah* applied it usually to appalling innovations that encroached scandalously upon central precepts of the law such as unjust taxation (*maks*), administrative corruption, and hanging pictures of judges and rulers in public places. See Abu Ishaq al-Shatibi, *Al-I’tisam*, 2:570, 594; cited in Abd-Allah Umar Faruq, *Innovation and Creativity in Islam*, Nawawi Foundation, 2006, p.7; See also Al-‘Izz bin Abdulsalam, *Al-Qawa’id al-Kubrah*, vol.2, p.337-339.

“The first innovation (*bid’ah*) that took place after the Messenger of Allah was satiety from eating (*al-shab’*)”.³⁶⁵ This often is cited as evidence of the term *bid’ah* being used for blameworthy innovations in *mu’amalat* that contradict the letter or spirit of the Shari’ah.³⁶⁶

An example of how a *mu’amalat* could become a *bid’ah*, the wearing of gold or silk by men, or the consumption of alcohol or swine is a *mu’amalat* that is prohibited (*haram*) by explicitly clear evidence. Accepting that the Qur’an forbids the consumption of alcohol is an obligation (*fard*), which is based on the explicitly clear and undisputedly authentic verses of the Qur’an (and Hadith). Rejecting this teaching of the Qur’an as wrong amounts to disbelief (*kufr*). Accepting that it is forbidden (*haram*) to consume alcohol, but still consuming it is wrong-doing (*fisq*) but not *kufr*. Re-interpreting it as not being actually forbidden but only discouraged (*makruh*) or permitted (*halal*) is a blameworthy innovation (*bid’ah*) and not just a prohibition (*haram*). It is a blameworthy *bid’ah* because it contradicts the teachings of the Qur’an and Sunnah, and yet it is being presented as part of the Shari’ah. The same logic would apply to consumption of the “flesh of swine” or taking of “*riba*”, etc. – once the definition was agreed upon.

The critical question being asked by those who hold this opinion appears to be, “*What methodology or criteria did the Prophet and his Companions use in deciding acceptable and unacceptable innovations? Did they regard all innovations in ibadah as automatically blameworthy, or was it permitted unless it contradicted or disagreed with the Sunnah?*” These scholars consider this approach to innovations as being more representative of the methodology and criteria of the Prophet and most of the Sahabah, who did not consider every innovation as automatically blameworthy, but treated each innovation on its own merit (or demerit).

To these scholars, not every innovation is misguidance, but every innovation THAT CONTRAVENES OR CONTRADICTS THE SHARI’AH is misguidance!³⁶⁷

³⁶⁵ Al-Suyuti, *et al.*, *Sharh Sunan Ibn Majah*, Hadith no. 1094, Al-Maktabah al-Shamilah; Also, Al-San’ani, *Subul al-Salam*, Vol. 4, p.179; cited in Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, Vol. 2, AQSA Publications, UK, 2005, p.71.

³⁶⁶ Ibid.

³⁶⁷As earlier mentioned, scholars upheld the validity of the famous Hadith: “*Every innovation is misguidance.*” None however understood it as abrogating the obligation of performing *ijtihad* and finding unique innovative solutions to new problems. (Abd-Allah Umar Faruq, *Innovation and Creativity in Islam*, Nawawi Foundation, 2006, p.8).

Therefore, regarding the meaning of the hadith that "*Every innovation (bid'ah) is misguidance...and leads to hell*", it would not be incorrect to say that both groups or opinions qualify (*takhsis*) this hadith and none of them really takes it completely literally nor do they completely generalize it. One group appears to qualify the word "every" (*kullu*) and the other qualifies "innovation" (*bid'ah*). Those who qualify "every" say it does not apply to every innovation in every aspect of life - including *mu'amalat* - but is specific to *ibadah* or devotional worship. Those who qualify the word "*bid'ah*" say it does not apply to every type of *bid'ah*, but is specific to that which contradicts the principles of the *deen* or *ijtihad* - the Qur'an, Sunnah, *Ijma'*, *qiyas*, practise of the Sahabah, *malsalah*, etc.

In conclusion, the objective of this discussion is purely for an appreciation of the fact that there exist respectable differences among the greatest classical scholars of Islamic jurisprudence on the application of the principle of general permissibility to devotional matters, and by implication to the definition and concept of *bid'ah*. It is not the objective of this material to delve further than this into the various differences among scholars in their arguments or more specific understandings and definitions of the concept of *bid'ah* in law and in theology.³⁶⁸

Supplement on Bid'ah:

Due to the fact that many young Muslims today are not aware that a significant number of respected classical scholars from various Schools of jurisprudence have actually classified *bid'ah*

³⁶⁸ For more readings on the concept of *Bid'a*, see Muhammad al-Ghazali, *Within the Boundaries of Islam: A Study on Bid'a*, Islamic Book Trust, Kuala Lumpur, 2010; Abd-Allah Umar Faruq, *Innovation and Creativity in Islam*, Nawawi Foundation, 2006; Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, AQSA Publications, 2006, vol.2; Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Ilmiah Publishers, Kuala Lumpur, Malaysia, 1998, p.131-143; Musharraf Hussain, "Is Every New Thing a *Bid'a*?", *Q-News*, April Issue, 2001, p.24; Nuh Ha Mim Keller, *The Concept of Bid'a in the Sharia of Islam* (M.A.T. Papers, Cambridge: Muslim Academic Trust, 1999); See also Imam An-Nawawi, *Tahdhib al-Asma wal-Lughat*, vol.3, p.20-22; Al-'Izz Ibn 'Abd al-Salam, *Al-Qawa'id al-Kubra*, vol.2, p.337-339; Al-Ghazzali, *Ihya Ulum al-Din*, vol.1, p.279; Ibn Hazm al-Zahiri, *Al-Ihkam fi Usul al-Ahkam*, vol.1, p.47; Ash-Shawkani, *Nayl al-Awtar*, vol.4, p.60; Ash-Shatibi, *Al-I'tisam*, vol.2, p.18-19, 63-68; Ibn Rajab, *Jami'i al-Ulum wa al-Hikam*, under hadith twenty eight of al-Nawawi's *Forty Hadith*. Al-Kirmani, *al-Kawakib al-Daraari Sharh Sahih al-Bukhari*, vol.9, p.54; Ibn Abidin, *Hashiya*, vol.1, p.376, 560; al-Turkmani, *al-Lum'a fi al-Hawadith wa al-Bid'a*, vol.1, Stuttgart, 1986, p.37; al-Tahanawi, *Kashf Istilahat al-Funoon*, Beirut, 1966, vol.1, p.133-135; al-'Ayni, *'Umdah al-Qari*, in al-Himyari, *al-Bid'ah al-Hasanah*, p.152-153; al-Turtushi, *Kitab al-Hawadith wal-Bid'a*, p.15, 158-159; Ibn al-Hajj, *Madkhal al-Shar' al-Sharif*, Cairo, 1336, vol.2, p.115; al-Qarafi, *al-Furooq* vol.4, p.219; al-Zurqani, *Sharh al-Muwatta*, vol.1, p.238; Abu Shamah, *al-Ba'ith 'ala Inkar al-Bid'a wal-Hawadith*, Riyadh: Dar al-Raya, p.93.

as being either good (*bid'ah hasanah*) or bad (*bid'ah sayyi'ah*) based on the analyses of proofs (*adillah*), we have decided to add some of these quotations here for the record. This is not meant to give support to the strength of their arguments, but merely to highlight the fact that they exist and should be respected or at least tolerated.

- Harmala ibn Yahya al-Tujaybi said "I heard al-Shafi'i say: 'Innovation is of two types: approved innovation (*Bid'ah mahmudah*) and disapproved innovation (*Bid'ah madhmumah*). Whatever conforms to the Sunnah is approved and whatever opposes it is abominable.'"³⁶⁹
- According to Ibn Jawzi, "*Bid'ah* in legal convention is whatever is blameworthy in contravening the foundations of the law."³⁷⁰
- Qadi Abu Bakr Ibn Al-Arabi Al-Maliki says, "Only the *bid'ah* that contradicts the Sunnah is blameworthy"³⁷¹
- Ibn Hajar al-Asqalani wrote: "Put precisely, if an innovation (*bid'ah*) comes under the rubric of things regarded as good in the law, it is good. If it comes under the rubric of things ill-regarded in the law, it is ill-regarded. Otherwise, it belongs to the category of neutral things. Thus, [in general] [*bid'ah*] may be divided into the five [ethical] divisions."³⁷²
- Al-Nawawi supported this five-fold classification of innovations (*bid'ah*) by praising Ibn 'Abd al-Salam and quoting from his *al-Qawa'id al-Kubra*: "The way to discriminate in this is that the innovation be examined in the light of the regulations of the Law (*qawa'id al-shari'ah*). If it falls under the regulations of obligatoriness (*ijab*), then it is obligatory; under the regulations of prohibitiveness (*tahrim*), then it is prohibited; recommendability, then recommended; offensiveness, then offensive; indifference, then indifferent."³⁷³

DISCUSSION QUESTIONS:

³⁶⁹ Narrated by Abu Nu'aym through Abu Bakr al-Ajurri in *Hilyat al-Awliya* Vol.9, p.121; Ibn Rajab in *Jami al-'Ulum wal-Hikam*, p.267.

³⁷⁰ Ibn al-Jawzi, *Gharib al-Hadith*, vol.1, p.61; cited in Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, Vol. 2, AQSA Publications, UK, 2005, p.71

³⁷¹ Ibn al-'Arabi, *Aridat al-Ahwadhi*, vol.10, p.147; cited in Gibril Fouad Haddad, *Sunna Notes: Studies in Hadith and Doctrine*, Vol. 2, AQSA Publications, UK, 2005, p.72

³⁷² Ibn Hajar, *Fath al-Bari*, 4:253.

³⁷³ *Tahdhib al-Asma wal-Lughat* Vol.3, p.20-22.

1. Why is there a general consensus on the application of the general principle of permissibility to social transactions and mundane affairs?
2. Why do some scholars regard the principle of permissibility as not being applicable to devotional worship and creed?
3. Why do some scholars not restrict the application of the principle of permissibility to only social transactions or mundane affairs?
4. What are the different ways by which the various scholars qualified the apparently general statement in the hadith: “Every innovation is misguidance...”?
5. What would all scholars agree is a blameworthy form of innovation (*bid’ah*)?
6. What feature(s) would an act of *mu’amalat* or *adat* have in order for it to be considered blameworthy bid’ah by some scholars?
7. What sort of innovations in *ibadah* do some scholars regard as permissible and even rewarding?

LESSON 33: AGREEMENTS AND DISAGREEMENTS

Having discussed the maxims of Islamic Jurisprudence, a fundamental maxim used by the majority, and the differences of opinion between primarily Hanbali scholars and scholars of other Schools of Juristic Thought, this lesson summarises the basis or foundation of agreements and disagreements among jurists when it comes to deriving verdicts (*fatwas*).

The scholars agree on the following:

- Where the Qur'an and *Hadith Mutawatir* (which are *qati' al-thubut*) are explicitly clear and unambiguous in their meaning and implications (*qat'i al-dilalah*), there is no debate or difference of opinions among scholars.
- Those teachings that are based on these (clearly understood and indisputably authentic sources) form the core of what it is to be a Muslim. *Qat'i* texts are the bases for fundamental creed (*aqidah*), ritual worship (*ibadat*) and the most essential social transactions (*mu'amalat*), and therefore are bases for establishing whether a person is a Muslim or not.

The scholars disagree however, on a number of other issues. As with specialists or experts in any field in which there is research and development, there will be some major and minor differences between them in their assessment of the evidence, the contexts in which they apply their preferred procedures and methodologies, their assumptions about priorities and the consequences of their decisions. Also attached to the decisions of scholars are those natural human error and biases.

Jurists differ in their verdicts (*fatwas*) for 3 main reasons: ³⁷⁴

1. There is silence in the text of the Qur'an and *Sunnah* so scholars embark on *ijtihad* using their preferred tools or rational approaches. ³⁷⁵
2. There may be apparently conflicting evidence in the texts and the scholars differ on how they should be resolved. ³⁷⁶
3. They may differ in their assessment of the environment, context, situation or "reality" (*waqi'*) in which their verdicts will be applied.

Sincere mistakes by a qualified scholar or judge, however, are actually rewarded by Allah because of the scholar's earnest intention to assist others with a useful verdict. The scholar also gets a double reward if his or her verdict is correct in the eyes of Allah. ³⁷⁷

The diagram below shows the pathways through which scholars of different Schools of Jurisprudence reach differing conclusions about prohibitions and discouragements from their examination of the texts.

Where the evidence for a position is not clearly established from the text of the Qur'an or from *Hadith Mutawatir*, scholars begin to differ as a result of their hierarchical order of evidence and the preferred methodology of their Schools of Juristic Thought and *mujtahid* imams (see Lesson

³⁷⁴ Taha Jabir Al- Alwani, *Ethics of Disagreement in Islam*, The International Institute of Islamic Thought, Herndon, Virginia, USA, 1993, p. 21-34; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 2nd Revised Edition, Ilmiah Publishers, Malaysia, 1991, p.323-348, 351-366 and 468-474; Muhammad al-Tahir Ibn 'Ashur, *Treatise on Maqasid al-Shari'ah*, IIIT London, 2006, p. 26-49; Ibn Majah, no. 4251, al-Tirmidhi, no. 2499; see also Mohammad Omar Farooq, *Toward our Reform: From Legalism to Value-Oriented Islamic Law and Jurisprudence*, The International Institute of Islamic Thought, London, 2011, p. 179, Taha Jabir Al- Alwani, *Ethics of Disagreement in Islam*, The International Institute of Islamic Thought, Herndon, Virginia, USA, 1993, p.91-107, Ibn Taymiyyah, *Al-Wasiyyah Al-Kubrah*, p.2, Tariq Ramadan, *To Be A European Muslim*, The Islamic Foundation, Leicester, 1999, p. 13-49, Ibn Majah, no. 4251, al-Tirmidhi, no. 2499, Ibn Taymiyyah, *Qai'dah Ahl al-Sunnah wa al-Jama'ah*, p.4; Ali Gomaa, *Responding from the Tradition, Fons Vitae*, p.20-22 and 197-199, and Shaykh Abdullah bin Bayyah, (Vol.1 and 2, 18 audio CDs), trans. from Arabic by Hamza Yusuf (California, USA: Alhambra Productions, 2000). Differences occurred during the time of the prophet and his companions, but they still remained united as a community in enjoining right and forbidding wrong.

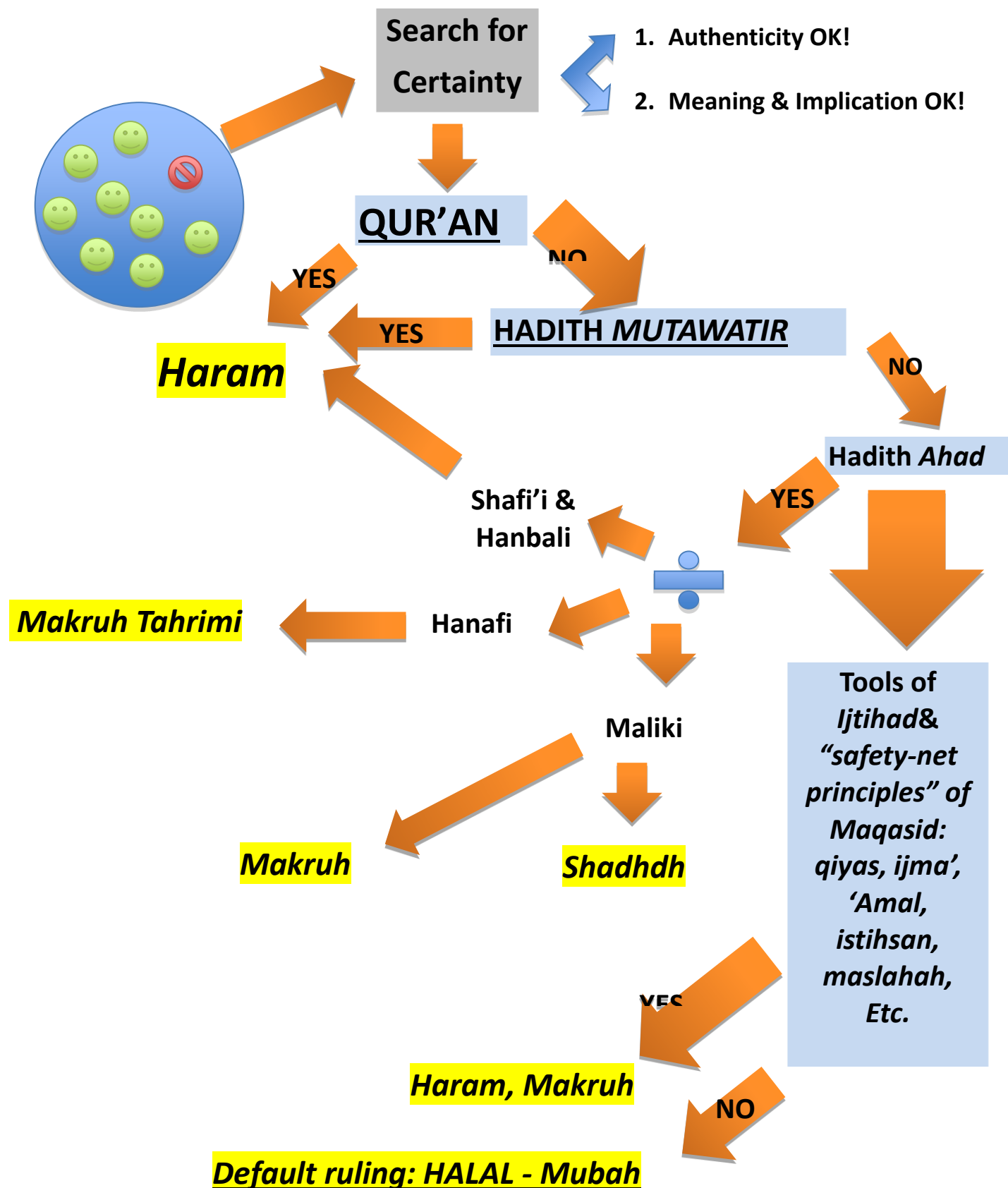
³⁷⁵ See Lesson 20 for a summary.

³⁷⁶ See a wonderfully summarized discussion on the major approaches used by scholars for resolving "opposition" or apparently conflicting evidence, and some of the merits and demerits of each approach in Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.218-226

³⁷⁷ Al-Bukhari, no. 7352; Muslim no. 4584; al-Tirmidhi no. 1326

20 for a summary). These divergent methodologies give different levels of authority to each “secondary source” of evidence. It gets even more complicated if the various pieces of evidence (*adillah*) used, conflict or appear to conflict with each other in some way.

MU'AMALAT: Default ruling: Everything is Halal except if clearly Haram



DISCUSSION QUESTIONS:

1. What type of issues would all scholars of all the major schools of juristic thought agree or have a consensus on?
2. Discuss 3 main reasons why scholars would differ in their verdicts *fatwa* on a particular issue.
3. Why would scholars differ when the texts of the Qur'an and Sunnah are silent on a specific issue?
4. How can there be apparently conflicting evidence in authentic text?
5. Why would scholars differ in how they resolve apparently conflicting evidence in the text?
6. In what ways would scholars differ in their assessment of social contexts?
7. Design a flowchart showing how various schools of juristic thought would assess the permissibility or otherwise of an action related to *mu'amalat*, using evidence from the Qur'an, *Sunnah Mutawatir* and *Sunnah Ahad*.

LESSON 34: PERMUTATIONS OF CERTAINTY AND SPECULATION IN AUTHENTICITY AND MEANING

So far, this material has tried to show, that in the search for certainty regarding the will of God to which a Muslim must submit, scholars consider various tools and proofs in order to increase their level of certainty regarding both the source and authenticity of relevant information, and their understanding of its implications. Their various methodologies have also tried to harmonize and balance, to the best of their abilities, their pursuit of the spirit or purpose of the law and the respect for its letter, while recognizing their natural limitations in fully grasping a divine text that is meant for all time and people.

The following 4 major permutations or combinations of certain/categorical (*qat'i*) and speculative/presumptive (*zanni*), as applied to the historical authenticity (*thubut* or *wurud*) or meaning and implications (*dilalah*) are important to bear in mind when considering the level of certainty which scholars have when issuing or assessing rulings derived from any text or proofs (*adillah*), in Islamic jurisprudence. They help us in better understanding and even anticipating where and why differences in rulings might arise. Understanding these permutations and their implications to scholarly dissent improve our analysis of issues, prepare us to better ask more focused questions and be more humble about our own positions.

These permutations are therefore meant to assist us in better observing the boundaries of tolerance and respect for differing opinions among classical and contemporary scholars and their Schools.

These 4 major permutations are:³⁷⁸

1. *Qat'i al al-thubut* and *Qat'i al-Dilalah* (“certain authenticity” and “certain meaning”)
2. *Qat'i al-Thubut* and *Zanni al-Dilalah* – (“certain authenticity” and “presumptive meaning”)
3. *Zanni al-Thubut* and *Qat'i al-Dilalah* – (“presumptive authenticity” and “certain meaning”)
4. *Zanni al-Thubut* and *Zanni al-Dilalah* – (“presumptive authenticity” and “presumptive meaning”)

1. *Qat'i al al-thubut* and *Qat'i al-Dilalah* (“certain authenticity” and “certain meaning”)

This is a situation where both the authenticity of the text and its meaning/implications are definitive, categorical, certain and indisputable. This permutation gives the highest level of certainty and is the closest to an “absolute truth”. This is often the permutation that is behind those topics of unanimity among scholars and the Schools of juristic Thought.

They include those issues of agreement regarding worship and the 5 pillars such as the number of compulsory (*fard*) daily prayers, fasting in Ramadan,³⁷⁹ the number of *raka'ahs* for each prayer, etc.; the basic Articles of Faith or creed such as belief in Allah, Angels, divine revelation, prophethood, the Hereafter, Judgment Day, existence of *ghayb* (reality beyond human perception), etc.; the development and realization of virtues of God-consciousness, justice, compassion, honesty, forgiveness, respect for parents, generosity, etc.; the agreed upon prohibitions such as adultery, consumption of alcohol, eating pork, lying, stealing, slander, murder, etc.; and other issues such as the shares of certain heirs in inheritance, the number of witnesses required to prove adultery, etc.

Those teachings of Islam that meet the criteria of certainty in authenticity and meaning (*qat'i al-thubut wa al-dilalah*) form the fundamental foundations of Islamic teachings (*Usul al-Din*).

³⁷⁸ For more on this, see Ministry of Awqaf and Religious affairs, *Al-Mausuat al-Fiqhiyya al-Kuwaitiyya*, Dar al-Salasil, Kuwait, Vol.21, p.24; Ahmad bin Muhammad bin Isma'il Al-Tahawi Al-Hanafi, *Hashiyatu 'ala Maraqi al-Falah*, Mataba'at al-Amiriya Al-Kubra, Cairo, 1318AH, Vol.1, p.37; *Hashiyatu Radd al-Mukhtar*, Vol.1, p.102, Al-Maktabah Al-Shamila; Abd al-Kareem Khudair, *Sharh Matn al-Waraqat*, p.274, Al-Maktabah Al-Shamila.

³⁷⁹ Wahba al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuhu*, Dar al-Fikr, Damascus, Vol.8, p.268

They are the core and kernel of what binds all Muslims as one community (ummah) in spite of their diversity on other subsidiary matters.³⁸⁰

In these cases where there is absolute certainty regarding both the authenticity of the text and the meaning and implications of the text, then there is good reason for a qualified scholar to feel comfortable in using such evidence to classify actions as either *mustahab*, *makruh*, *fard/wajib* or *haram*, *bid'ah* and even *kufr* if the evidence definitely points to that. The scope of interpretation and *ijtihad* is consequently confined to the *zanni* proofs alone where authenticity and definitiveness are speculative.³⁸¹

As discussed earlier in this material, while scholars of the Shafi' and Hanbali Schools would regard an authentic (*sahih*) single-chained (*ahad*) hadith on its own (with no other supporting proofs) sufficiently reliable or certain to classify things or actions ('*amal*) as *fard* and *haram*, the Maliki and Hanafi would usually not. The Hanafi would however use such hadith for the *hukum*-value(rephrase) of *wajib* and *makruh tahrimi*.³⁸² Nearly all scholars of the four major Schools of Juristic Thought would however not regard such hadith as sufficiently reliable in certainty for the purpose of establishing basic creed or doctrine (*Aqidah*) or for declaring disbelief (*Kufr*).

2. *Qat'i al-Thubut* and *Zanni al-Dilalah* ("certain authenticity" and "presumptive meaning")

This is a situation where the text of the Qur'an or Sunnah may be considered authentic with certainty, but the meaning and implication of the text is ambiguous or speculative (*zanni*), open to alternative interpretations and therefore not definitive or certain.

According to scholars, the speculative texts (*ayat*) of the Qur'an are open to interpretation and *ijtihad*. The best interpretation is that which can be obtained from the Qur'an itself, that

³⁸⁰ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.215-216

³⁸¹ Khallaf, *'Ilm*, p. 35, Abu Zahrah, *Usul*, p. 711; Shaltut, *Al-Islam*, p. 498; Cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.21

³⁸² Mashur bin Hasan Salman, *Al-Tahqiqat wa al-Tankihat 'ala Matn al-Waraqat*, Dar al-Imam Malik, Abu Dhabi, 2005, p.48

is, by looking at the Qur'an as a whole and finding the necessary elaboration elsewhere in a similar or even a different context. The *Sunnah* is another source which supplements the Qur'an and interprets its rulings. When the necessary interpretation can be found in an authentic Hadith, it becomes an integral part of the Qur'an and both together carry a binding force. Next in this order come the Companions who are particularly well-qualified to interpret the Qur'an in light of their close familiarity with its text, the surrounding circumstances, and the teachings of the Prophet.³⁸³ As mentioned earlier, the more conjectural (*zanni*) the precept or legal instruction is, the more strongly applied the criterion for further qualifying it by reference to the general good (*maslahah*).³⁸⁴

Common examples, some of which have been cited earlier, include verses of the Qur'an where scholars are not agreed on their meanings: Whether, for example, the prohibition of marriage to "your daughters" (*banatukum*) in Surah al-Nisa (Qur'an 4:23) also applies to illegitimate children or not; whether a particular verse of the Qur'an is actually abrogated by another one or not;³⁸⁵ whether the phrase "to be banished from the earth" (*yunfaw min al-ard*) which occurs in Surah al-Ma'idah (Qur'an 5:33) would accommodate imprisonment, and not just exile, as a possible punishment for highway robbery or waging war (*hirabah*) on the community and its legitimate leadership.

Sometimes a phrase in the text may be certain (*qat'i*) in one sense and speculative (*zanni*) in another. A Qur'anic injunction therefore may simultaneously possess a definitive and a speculative meaning, in which case each of the two meanings will convey a ruling independently of the other. An example is the injunction concerning the requirement of ablution (*wudu'*) which reads in part "... and wipe your heads" (Qur'an, al-Ma'idah, 5:6). This text is definitive (*qat'ial-dilalah*) on the requirement of wiping (*wamsahu*) of the head (*bi ru'usikum*) in ablution (*wudu'*), but since it does not specify the precise area of the head to

³⁸³ Khallaf, *Ilm*, P. 35; Abu Zahrah, *Usul*, P. 71; Cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.28

³⁸⁴ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.92-93.

³⁸⁵ See Israr Ahmad Khan's *The Theory of Abrogation: A Critical Evaluation*, Research Centre, International Islamic University Malaysia (IIUM), Malaysia, 2006.

be wiped, it is speculative (*zanni al-dilalah*) in regard to this point.³⁸⁶ Hence the jurists are unanimous in regard to the first, but have differed in regard to the second aspect of this injunction.³⁸⁷

In this situation, while scholars may be more comfortable classifying actions as *mustahab* or *makruh*, they are usually very cautious in referring to things as *Wajib/Fard* or *Haram* because of the element of uncertainty regarding the meaning and implications (*Zanni al-Dilalah*).³⁸⁸ According to Ibn Taimiyyah and others, the early Muslims (*Salaf*) and great scholars were very careful in referring to things as prohibited (*haram*) or religious obligations (*fard/wajib*) if they did not have clear and certain evidence to back their conclusions.³⁸⁹ It is in situations such as these that Hanafi scholars for example would avoid using the legal ruling (*hukum*) of *fard* or *haram*, and instead use *wajib* or *makruh tahrimi*.

In such cases, even where scholars feel confident in the correctness of their chosen interpretation that an action or thing is, or should be, *wajib/fard* or *haram*, there is still respect, tolerance and humility shown towards alternative interpretations of other scholars, along with the acceptance of the real possibility of actually being wrong in one's preferred opinion.³⁹⁰

The definitive meanings and implications (*qat'i al-dilalah*) of the Qur'an for example, are an integral part of the Islamic doctrine (*aqidah*), and anyone who rejects or denies its validity automatically renounces Islam. However, denying a particular interpretation of the *zanni* does not amount to transgression. The *mujtahid* is entitled to give it an interpretation, and it is the

³⁸⁶ Mahmud bin Hatab Al-Subki, *Irshad al-Khalq ila Din al-Haqqi*, Vol.1, p.284, Al-Maktabah al-Shamila.

³⁸⁷ Badran, *Usul*, p. 66; Cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.30

³⁸⁸ Ahmad Hasan, *The Principles of Islamic Jurisprudence: The Command of the Sharia and Juridical Norm*, Adam Publishers, New Delhi, 2005, p.40.

³⁸⁹ Cited in Yusuf Al-Qaradawi, *The Lawful and the Prohibited in Islam*, Salimiah, 1992, p.18-21; See also Arif Ali Khan et al., eds., *Encyclopaedia of Islamic Law*, Vol. 3: Islamic Law in Practice, Kuala Lumpur: Crescent News(KL) Sdn Bhd, 2006, p.127-128.

³⁹⁰ See examples of courtesy and mutual respect in handling such differences of opinions among scholars in works such as Taha Jabir Al- Alwani's *Ethics of Disagreement in Islam*, The International Institute of Islamic Thought, Herndon, Virginia, USA, 1993.

ruler who may select one of the various interpretations for purposes of legislation or enforcement.³⁹¹

Besides issues related to law and jurisprudence (*Fiqh*), and in matters related to doctrine (*aqidah*) and theology (*kalam*), it is not always self-evident to scholars whether a text of the Qur'an is *qat'i' al-dilalah* or *zanni al-dilalah*, and hence may be open to alternative interpretations. This has generated heated disagreements, disturbing tension and even violent conflicts between the followers of different scholars and Schools. Some of these are still major reasons of disunity in some parts of the Ummah today. Examples of these have included enduring disagreements over issues associated with verses that may be viewed by some as having "ambiguous" (*mutashabihat*)³⁹² meanings in the Qur'an, such as some descriptions of the "nature" of Allah³⁹³, some details about various aspect of "what is beyond our perception" or *ghayb* (such as descriptions of the actual nature of the Hereafter, etc.) and the real nature of *qadr* ("destiny", "predestination", "fate", etc.), etc.

3. *Zanni al-Thubut* and *Qat'i al-Dilalah* ("presumptive authenticity" and "certain meaning")

This is often where a presumptively authentic single-chained (*ahad*) hadith (which is *zanni al-thubut*), has a meaning that is explicitly clear and not ambiguous (*qat'i al-dilalah*).³⁹⁴ This combination of the "speculative/presumptive" and the "certain" also applies to a situation whereby any of the proofs (*adillah*) are explicitly clear in their meaning and implications but lesser in certainty regarding their credibility and authenticity unlike the Qur'an or Hadith

³⁹¹ Shaltut, *Al-Islam*, PP. 498-99, Abu Zahrah, *Usul*, P. 71; Khallaf, *'Ilm*, P. 35; Badran, *Usul*, p.67; Cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.34-35

³⁹² "Allegoric" or "ambiguous" meanings - as there is no agreement on the meaning of *muhkamat* or *mutashabihat*. See discussions by various Qur'anic commentators on Qur'an 3:7. See also, Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.100-101.

³⁹³ This is evident from the early debates and disagreements between scholars of the Ahl al-Hadith, Ash'ari, Maturidi and Mu'tazilite Schools of Theology. Their disagreements were not on the authenticity of the relevant Qur'anic texts, but on their meaning and implications.

³⁹⁴ Zain al-Deen al-Hanafi Ibn Najim, *Al-Bahr al-Ra'iq Sharh Kanz al-Daqa'iq*, Dar al-Ma'rifa, Beirut, Vol.1, p.16

mutawatir. *Zanni al-thubut* by implication implies to all other “secondary sources” (*adillah*) such as *ijma’*, *qiyas*,³⁹⁵ and any other tool of *ijtihad* which is necessarily of “speculative” (*zanni*) authority, but where the meaning or implication understood from it is clear and definitive. The *adillah* here are *zanni al-thubut*, but the meaning is *qat’i al-dilalah*, and therefore not open to alternative interpretations.

This therefore applies to all or most verdicts (*fatwas*) that are based solely on single-chained (*ahad*) hadith or on some other sources/evidences (*adillah*) that are “probable” (*zanni*) in authenticity or reliability. Most scholars regarded *zanni al-thubut* evidence (which was acceptable to their respective Schools of Juristic Thought) as sufficiently reliable enough for the purpose of giving rulings of “recommended” (*mustahab*) or “discouraged” (*makruh*).³⁹⁶ Depending on the School (and scholar), these often included single-chained (*ahad*) hadith, consensus (*ijma’*), analogy (*qiyas*), practice or praxis (*‘amal*) of the People of Medina, juristic discretion or preference (*istihsan*), opinion of a companion (*ra’yi al-sahabah*), public interest (*maslahah*), etc.

They differed more clearly, when it came to using these *Zanni al-thubut* evidence for the purpose of establishing an “obligation” (*Fard/Wajib*) and a “prohibition” (*haram*).³⁹⁷ This is because Schools and their scholars differed with regard to the degree of weight/authority and validity/legitimacy they accorded these proofs (*adillah*). Many considered these as presumptive but “authoritative enough” for the purpose of the value-judgments (*hukum*) of *fard/wajib* and *haram*, while others did not.³⁹⁸ As discussed earlier, it should be borne in mind that in addition to single-chained (*ahad*) hadith, there was always a respected distinguished

³⁹⁵ Ministry of Awqaf and Religious affairs, *Al-Mausuat al-Fiqhiyya al-Kuwaitiyya*, Dar al-Salasil, Kuwait, Vol.21, p.22

³⁹⁶ Mashur bin Hasan Salman, *Al-Tahqiqat wa al-Tankihat ‘ala Matn al-Waraqat*, Dar al-Imam Malik, Abu Dhabi, 2005, p.49

³⁹⁷ As discussed earlier, many Malikis and Hanafis would not use for example single-chained (*ahad*) hadith alone, with no other corroborating evidence to establish a “prohibition” (*haram*) or an “obligation” (*fard*). Hanafis would however use such *zanni* evidence to establish “less certain obligation” (*wajib*) and a “less certain prohibition” (*makruh tahrimi*).

³⁹⁸ It therefore amounts to a “preferable conjecture” (*al-zann al-rajih*). Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2001, p.51; Muhammad bin Husain bin Hasan Al-Jizani, *Ma’lim fi Usul al-Fiqh ‘inda Ahl Al-Sunna wa al-Jama’a*, Dar Ibn Al-Jawzi, Riyadh, KSA, p.154

jurist (*mujtahid*), scholar, or School of Juristic Thought (*madhhab*) who did not even accept as independently valid, the use of one or some of these *zanni al-thubut* evidences (*adilla*) or tools of *ijtihad*.³⁹⁹

With very few exceptions, as noted earlier, scholars generally did not insist on using presumptively authoritative (*zanni al-thubut*) “sources” for the purpose of establishing essential doctrine or creed (*aqidah*) even if the meaning was certain (*qat’i al-dilalah*).

The more the corroborating “probable” (*zanni al-thubut*) evidences, the stronger the proof was for a particular verdict. Therefore where analogy (*qiyas*) was supported by public interest (*maslaha*) and/or consensus (*ijma’*), it was stronger and more reliable than where the *qiyas* did not have such support.

Examples of positions based on *Zanni al-Thubut* and *Qat’i al-Dilalah* – (“presumptive authenticity” and “certain meaning”) include the prohibition of eating carnivorous animals, the finality of an intentional triple divorce at one instance, the purity of dogs and their saliva, collecting zakat on horses, the Maliki preferred form of the Call for Prayer (*adhan*) based on hadith by Abu Mahzurah which was supported by *Amal* of Medina, etc.

This has naturally called for serious caution among scholars and an even greater need to respect of the Ethics of Disagreement (*Adab al-Ikhtilaf*) when dealing with opinions and differences that result from evidence that is *Zanni al-Thubut* and *Qat’i al-Dilalah* – (“probable authenticity” and “certain meaning”).

As explained earlier, this situation does not apply to the Qur’an or multiple-chained (*mutawatir*) hadith as these are sources of truth that are of “certain authenticity” (*qat’i al-thubut*).

4. *Zanni al-Thubut* and *Zanni al-Dilalah* (“presumptive authenticity” and “presumptive meaning”)

³⁹⁹ Scholars differ in whether to accept some of these as valid and legitimate tools of *ijtihad* for deriving rulings with. The early Shafi’ did not accept *istihsan* or *maslahah*; most Hanafi and others did not accept *Amal* of Medina; Zahiri did not accept *qiyas*, etc. as already discussed elsewhere in this material.

This refers to a single-chained (*ahad*) hadith or any other proof (*adillah*) regarded as speculative or presumptive in authority (*zanni*) whose meaning and implications are also speculative and open to alternative interpretations. Rulings based on this sort of evidence have the least degree of certainty regarding their authority.

Texts or proofs (*adillah*) of this sort are common and form the bases for many of the accepted, respected or tolerated “minor differences” of opinions within and between Schools of Juristic Thought. Because of the very “speculative” nature of these proofs, their implications are also often regarded as issues related to the branches or subsidiaries (*furu'*) and not fundamentals or principles (*usul*) of Islamic teachings. Here, the jurist’s knowledge and use of “safety-net principles” - juristic preference (*istihsan*), preclusion (*sadd al-dhara'i*) and unstated common good (*maslahah*) - becomes even more critical.⁴⁰⁰

Examples include the differences among some scholars over the veiling of the face (*niqab*) of a woman; the categorization of the punishment for apostasy and drinking alcohol as being fixed (*hadd*) or discretionary (*ta'zir*); the impurity of dogs based on analogy (*qiyas*) with a single-chained (*ahad*) hadith; the debates over certain types of music; the prohibition of interfaith inheritance; the circumcision of women and of male converts to Islam; and whether two transacting parties have a choice to renegotiate as long as they have not physically “separated” or departed from the place of transaction based on the interpretation of a hadith *ahad* (*al-bayyi'an bi al-khiyar ma lam yatafarraqah*); etc.

As a result of the fact that both the text/proof and the understanding of it are not certain or definite (*qat'i*), the basis of the value-judgment (*hukum*) to be derived from it will consequently be even more speculative and open to conjecture. In this case, making a pronouncement of *Wajib/Fard* or *Haram* was/is usually avoided when its uncertainty is clear enough to the scholar concerned. However, because scholars differ in the weight they give the *zanni al-thubut* evidence (that is acceptable to their respective Schools), and because they could also differ in their interpretation of the text or *adillah* as to whether the meaning is *qat'i* or *zanni al-dilalah*, they have generally agreed to disagree agreeably on such matters.

⁴⁰⁰ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.92-93. See more on the “Safety-net Principles” in Lesson 19.

The differing approaches and methodologies preferred by the various Schools and their scholars for handling apparently conflicting evidence also make it difficult for them to resolve some of their differences especially where the “speculative” element (*zanni*) may apply to either or both the proof and to its understanding. The fact however, that there is even a difference of opinion among distinguished scholars on whether a particular proof (*dalil*) or text (*nass*) is *zanni* or *qat’i* is itself usually evidence that it is more probably *zanni*. Hence the need for greater caution when speaking in God’s name or in the name of His Prophet (ﷺ), or when the difference of opinion on the issue may threaten unity or justice or other explicitly clear (*qat’i al-dilalah*) objective (*Maqasid*) of Shari’ah that is based on definitive text (*qat’i al-thubut*) such as the need for patience, forgiveness, humility, brotherhood, cooperation, facilitation, etc.

Conclusion

From all the 4 permutations of *Qat’i* and *Zanni*, as they apply to *al-Thubut* and *al-Dilalah*, it should be noted that if it is clear and understood that a particular issue or ruling or verdict is not established by an undisputedly authentic text with a clear definitive meaning, it is then strictly forbidden to judge one who commits or omits it as a debeliever (*Kafir*). It is also not proper to see him or her as a *fasiq* or violator of Allah’s injunction (i.e., for committing *Haram* or omitting *Fard /Wajib*) if there is an element of “speculation” in the proofs (*adillah*) and especially where it is an opinion of a respected scholar. Such judgements, even if sometimes necessary, should be left to the discretion of qualified scholars and not to their students or lay persons.⁴⁰¹

⁴⁰¹See more on this in Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Ilmiah Publishers, Kuala Lumpur, Malaysia, 1998

DISCUSSION QUESTIONS:

1. Give 2 examples of each of these permutations of speculation and certainty:
 - a. *Qat'i al al-thubut* and *Qat'i al-Dilalah* (“certain authenticity” and “certain meaning”)
 - b. *Qat'i al-Thubut* and *Zanni al-Dilalah* – (“certain authenticity” and “presumptive meaning”)
 - c. *Zanni al-Thubut* and *Qat'i al-Dilalah* – (“presumptive authenticity” and “certain meaning”)
 - d. *Zanni al-Thubut* and *Zanni al-Dilalah* – (“presumptive authenticity” and “presumptive meaning”)
2. Why is it important to learn to distinguish each of the above permutations or combinations of evidence?

LESSON 35: LET'S REVIEW!

Discussion questions:

Find a partner to discuss the following:

1. What are 2 different ways of understanding the word “*Sunnah*”?
2. Why would some aspects of the *Sunnah* not have legislative implications? Give two instances of sayings or actions of the Prophet (ﷺ) that are not legally enforceable on all Muslims?
3. List 3 of the 12 from Ibn Ashur’s classification of the Prophet’s Intent on legislation and give an example of each.
4. State 3 major maxims of Islamic Jurisprudence and 2 applications of each.
5. Articulate the premise of permissibility that the majority of jurists accept. What are its implications in terms of how halal and haram are deduced from texts?
6. What are the differences of opinion among the Schools of Juristic Thought on the topic of blameworthy innovation (*bid’ah*)?
7. What are 2 specific examples of what the majority of jurists would accept as ‘good’ or ‘harmless’ *bid’ah* but which the Hanbali School would still not permit.
8. What do the Hanafi and Shafi’i Schools of Jurisprudence agree on and disagree about with respect to the legal implications of *Hadith Mutawatir* and *Hadith Ahad*?

SECTION 6: THE AIMS AND OBJECTIVES OF SHARI'AH: KEEPING THE END IN MIND

Preamble to *Maqasid Al-Shari'ah*

While the field of *Usul al-Fiqh* is critical in reducing major differences of opinions, it has some major limitations. It should be obvious from the above that classical *Usul al-Fiqh* of the various Schools of juristic Thought (*madhahib*) was not, is not and could not be the final arbiter for settling all differences of opinions among even distinguished jurists (*mujtahids*). This is due to the fact that they differed in their approaches to the text, and in the methodologies, tools or “equations” they use to solve certain problems when the text was either silent or not explicitly clear.

In an order to reduce this diversity, some early scholars and other more contemporary ones have turned their attention to a more unifying aspect of Islamic legal thought which is related to, and form a part of, *Usul al-Fiqh*. This is the subject of the *Maqasid al-Shari'ah* which is concerned with the objectives, purposes and higher intents of Islamic legislation. Unlike most of *Usul al-Fiqh* which is characterised by a lot of technical details and diverse opinions, the field of *Maqasid* is more basic and less controversial but no less intellectually demanding.

If *Usul al-Fiqh* is to be likened to a map with roads linking various locations and destinations with the original “home” (Qur'an and Sunnah), *Maqasid* may be likened to a compass that helps in knowing when one is moving in the wrong direction. It has served as a compass for guiding both the interpretation of the texts (“construction of roads”), and in evaluating the quality of juristic reasoning and verdicts (or reaching the “right destinations”).

Traditionally most of the contents of the field of *al-Maqasid* were treated by various Schools (*madhhabs*) in discussions related to finding the legal reason (*'illah*) or wisdom (*hikma*) behind various injunctions for the purpose of analogy (*qiyas*), or in discussions related to accruing benefits or public interest (*maslahah*), or avoiding harm (*mafsadah*), blocking the means to harm (*sadd al-dharai'*), removal of hardship (*raf' al-haraj*), juristic preference or discretion (*istihsan*), and respecting local or regional custom (*al-'urf*), etc.

As a result of the contributions by jurists such as Imam al-Juwayni, Abu Hamid Al-Ghazali, Ibn Taimiyyah, Ibn Qayyim, Al-'Izz bin Abdulsalam, Al-Qarafi and especially Al-Shatibi, the field of *Maqasid al-Shari'ah* has been treated more as an independent subject by more contemporary jurists and scholars of the field such as Ibn Ashur, al-Dahlawi, Muhammad Ghazzali, Bin Bayyah, Al-Qaradawi, Taha Jabir al-Alwani, al-Raysuni, Kamali, Auda, Ramadan and many others. It is in this vein that the next section is treated separately and not as a part of discussions on the sources or methodologies of Islamic law.

LESSON 36: WHAT IS MAQASID AL-SHARI'AH?

The *Maqasid* (plural of *maqsad*) refers to the aims, higher intents, objectives, purposes, goals and principles of *Shari'ah*. These have been classified into 2 broad categories.⁴⁰²

1. **Promotion and preservation of the common good and benefit (*maslahah*) – *jalb al-masalih***
2. **Avoidance and protection from harm (*mafsada*) – *dar' al-mafasid***

The subject of *Maqasid* of *Shari'ah*, therefore, is concerned with the wisdom behind the rulings of *Shari'ah*, and focuses on the challenging questions of “why” at various levels. The *Maqasid* are those good ends that the law aims to achieve by blocking or opening certain means.⁴⁰³ Some scholars use the terms *Maqasid* (objectives, intent, goals, principles, etc.) and *Masalih* (general benefit, common good) interchangeably.⁴⁰⁴

The objectives (*maqasid*) are classified in different ways by various scholars for various purposes.⁴⁰⁵ The traditional classification has been to divide the *maqasid* according to 3 “levels of necessity” – absolute necessities (*daruriyyat*), needs (*hajiyyat*) and luxuries or embellishments (*tahsiniyyat*).

The necessities (*daruriyyat*) are then further classified into 5 or 7 categories – the preservation and enhancement of faith (*deen*), life (*nafs*), mind (*'aql*), wealth (*maal*), offspring (*nasab*), lineage (*nasal*), and honour (*'ird*).

Other *maqasid* that are captured in other classifications or overlapping *maqasid* include: social cohesion, justice, freedom, individual and communal rights, facilitation, magnanimity, security,

⁴⁰² This was originally done by 'Izz bin Abdul-Salam (nicknamed, “*Sultan al-Ulama*”). He also said that since the *dar' al-mafasid* is also meant as a way of bringing or accruing benefit for society, it implies that the *maqasid* of *Shari'ah* can be summarised into the single objective of *jalb al-masalih* (accruing or spreading benefit). See Al-'Izz bin Abd-Salam, *Qawai'd al-Ahkam fi Masalih al-Anam*, Dar al-Ma'rif, Beirut, p.4; see also Abdullah bin Bayyah, *Islamic Legal Philosophy (Qawa'id al-Fiqhiyyah)*, Al-Hambrah Productions (CD lecture series in Zaytuna Institute).

⁴⁰³ Jasser Auda, *Maqasid al-Shari'ah: A Beginner's Guide*, IIIT, London, 2008, p.2-3

⁴⁰⁴ Imam al-Juwayni, cited in Jasser Auda, *Maqasid al-Shari'ah: A Beginner's Guide*, IIIT, London, 2008, p.3

⁴⁰⁵ See Jasser Auda, *Maqasid al-Shari'ah: A Beginner's Guide*, IIIT, London, 2008, p.4-11; See also Mohammad Hashim Kamali, *Maqasid al-Shari'ah, Ijtihad and Civilizational Renewal*, Occasional Papers Series 20, IIIT London and IAIS Malaysia, 2012, p.15-37.

environmental protection, education, etc. There is no textually specified number of *maqasid*, nor is there one divine way of classifying them.⁴⁰⁶

According to **Imam al-Qarafi**, “A purpose (*maqasid*) is not valid unless it leads to the fulfillment of some good (*maslahah*) or avoidance of some mischief (*mafsada*)”.⁴⁰⁷ In other words, the *maqasid* of *Shari’ah* are the fulfillment of *maslahah* and the avoidance of *mafsada*.

Some scholars, however, prefer to regard the universal values and principles such as justice, compassion, forgiveness, dignity, facilitation, and humility as the *maqasid* of *Shari’ah*, while regarding the more specific beneficial actions that derive from these as being the *maslahah* (benefits). The *maqasid* are therefore viewed as the ultimate, unchanging objectives of the *masalih*.⁴⁰⁸ *Masalih* could, in this sense, sometimes be viewed as identical to the *maqasid* and sometimes as means towards attaining them.⁴⁰⁹

The Evidence and Level of Certainty regarding *Maqasid* or *Masalih* ⁴¹⁰

According to Tariq Ramadan,⁴¹¹

What did lead to disagreement and conflict in the juridical field, however, was the question of knowing if there was an actual need for this notion within the Islamic framework, or of recognizing *maslahah* as an independent source – even though supplementary – of the *shari’ah* (and, thus, a part of it whose scope has to be delimited), or of considering it as a part of another source such as *qiyas*. These different positions rely on another classification which distinguishes three types of *maslahah* (differentiated with regard to their class and not their hierarchical value such as essential or complementary). The *ulama'* have established a typology according to the degree of proximity of *maslahah* with the sources. If the *maslahah* is based on textual evidence, extracted from the Qur'an or the *Sunnah*, the *maslahah* is called *mu'tabara*

⁴⁰⁶ Jasser Auda, *Maqasid al-Shari’ah: A Beginner’s Guide*, IIIT, London, 2008, p.10

⁴⁰⁷ Shihab al-Din al-Qarafi, *al-Dhakhirah*, Dar al-Arab, Beirut, 1994, vol.5, p.478; Cited in Jasser Auda, *Maqasid al-Shari’ah: A Beginner’s Guide*, IIIT, London, 2008, p.4.

⁴⁰⁸ Mohammad Hashim Kamali, *Maqasid al-Shari’ah, Ijtihad and Civilizational Renewal*, Occasional Papers Series 20, IIIT London and IAIS Malaysia, 2012, p.16-20

⁴⁰⁹ *Ibid.*, p.20.

⁴¹⁰ For a more detailed discussion on “Certain and Probable *Maqasid*”, see Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari’ah*, IIIT, London, 2006, p.52-59.

⁴¹¹ Tariq Ramadan, *To Be A European Muslim*, The Islamic Foundation, Leicester, 1999, p.77-79.

(accredited) and, thus considered as definitive, not open to debate. If on the contrary, the stipulated *maslahah* is contradicted by a plain text (*nass qat'i*), we call it *mulgha* (discredited) and it is considered null and void. The third type relates to a situation where there is no text: the Qur'an and the *Sunnah* neither upheld nor nullified the *maslahah* which appeared after the time of revelation. This kind of *maslahah* is named *mursalah* (meaning unrestricted) for it allows the *ulama* to refer to their own analysis and reasoning in order to stipulate juridical decision taking into account their historical and geographical context. This by trying at the same time to remain as faithful as possible to the commands and spirit of the Islamic legal framework since the text, the letter of the law, is missing.

It is the latter type which has provoked so many debates and polemics, whose analysis is beyond the limits of our current study. Suffice it to say that the essential reason for the disagreement was the fear it induced among opponents about even the existence of *maslahah mursalah*, i.e. that such a notion could, hence permit some *ulama* to formulate rulings without reference to the Qur'an and the *Sunnah*, but rather through exclusive and absolutely free rational elaboration and all this in the name of some remote hardship. These were the main arguments of the Zahiri School as well as numerous Shafi'i and even Maliki *ulama* who did not recognize *maslahah mursalah* – given that it does not refer to the sources – as a proof: instead, they considered it specious (*wahmiyya*) and invalid for legislation. It was the same instinctive fear of a purely rational and disconnected approach to the Law that pushed **al-Ghazali** to confine the seeking of *maslahah* to the application of analogy (*qiyas*) which, by its nature, requires a very close link to the text in order to extract the cause (*illa*) by which the reasoning for the analogy is based.⁴¹²

This kind of excess was not to be found among the majority of proponents who considered *maslahah mursalah* as an authentic and legitimate source of legislation. They were of the opinion that the formulation of Islamic rulings must be made in light of and in accordance with the Qur'an and the *Sunnah* and moreover, only under demanding conditions (and this, even if *maslahah mursalah* is to be considered as an independent source when no text is available). A close study of the different opinions for and against *maslahah mursalah* shows that the *ulama* agreed on many major

⁴¹²*Ibid.*

points, particularly if we consider the conditions stipulated by its proponents among whom we find, in the first rank, the *'alim* of Granada, **ash-Shatibi**. We find, in these works a set of conditions and specifications regarding the recognition of public interest as a reliable legal source which restricts and prevents the *ulama* making unwarranted use of *maslahah*.⁴¹³

Conditions for validity of *Maslahah*

Tariq Ramadan continues,

Without going into too many details, we can sum up the three main conditions which are generally recognized if, of course, there is no text available:

1. The analysis and the identification have to be very close in order to be certain that we are facing a genuine *maslahah* (*haqiqiyyah*) and not merely an apparent or specious one (*wahmiyyah*). The *'alim* must reach a high level of certitude that, by formulating a ruling, this will, in respect of the Islamic framework, remove hardship and not the contrary, accrue harm.
2. The *maslahah* must be general (*kulliyyah*) and provide benefit to the people and society as a whole and not just one group, class or individual
3. The *maslahah* must not be in contradiction to, or conflict with a text from the Qur'an or the authentic *Sunnah*. In such a case, it can no longer be considered as a *maslahah mursalah* but as *maslahah mulgha*.

These three major conditions give us the outlines by which we have to understand the concept of *maslahah* (public interest) within Islamic law. What is clear firstly, is the supremacy of the Qur'an and the *Sunnah* over any other reference and juridical instrument. **Yusuf al-Qaradawi** reminds us aptly, following the statement of **al-Ghazali**, **ibn al-Qayyim** and **ash-Shatibi**, that all that is in the Qur'an and the Sunna is *per se* in accordance with human interest at large, for the Creator knows and wants what is best

⁴¹³*Ibid.*

for human beings and He indicates to them how they must implement His will. God says in the Qur'an about the revealed message that it:

... enjoins upon them the doing of what is right, and forbids them the doing of what is wrong and makes lawful to them the good things of life and forbids them the bad things, and lifts from them burdens and the shackle that were upon them (aforetime).

O mankind! There has now come unto you an admonition from your Sustainer, and a cure for all (the ills) that may be in men's hearts and guidance and grace unto all who believe (in Him).

We find the fact of preference for the good of mankind in the first revelation regarding intoxicants (this is among three leading to its definitive prohibition):

They will ask you about intoxicants and games of chance. Say: "In both there is great evil as well as some benefit for men; but the evil which they cause is greater than the benefit which they bring.

Ibn al-Qayyim al-Jawziyyah summarized this state of affairs as follows: *"The principles and the bases of the Shari'ah concerning the rulings and human interest in this life and the hereafter are all (founded) on justice, grace, human good, wisdom. Every situation which moves from justice to tyranny, from grace to hardship, from goodness to corruption, from wisdom to absurdity, has nothing to do with the shari'ah even if this is presented through allegorical interpretation (ta'wil). For the shari'ah is God's justice among His servants, God's grace among His creatures, His shadow on His earth, and His wisdom which proved His own existence as well, and this is the best evidence, the authenticity of His prophet."*⁴¹⁴

Seeking human *maslahah* for this life and the hereafter is the essence of Islamic commands and prohibitions. If the latter are clearly stated (*qat'i al-dalala wa al-thubut*) in the Qur'an and/or the *Sunnah* they should be respected and implemented in light of the overall understanding of *maqasid al-shari'ah* (the objectives of Islamic

⁴¹⁴Muhammad bin Abubakr Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqi'in*, Dar al-fikr, Beirut, 1977, vol.3, p.14.

teaching): they are – and represent – the revealed *maslaha* provided by the Creator to His creatures so that he could be guided towards the good.⁴¹⁵

DISCUSSION QUESTIONS:

1. What is meant by the term “*Maqasid al-Shari’ah*”?
2. What is the main concern of the *Maqasid al-Shari’ah*?
3. Describe the traditional classification of the *maqasid* according to the “levels of necessity”.
4. What are the traditional 5 or 7 sub-classifications of the “necessities” (*daruriyyat*) in *Maqasid* or *Maslahah*?
5. What is the difference between the *maqasid* of *Shari’ah* and *maslaha*?
6. What are the 3 broad classifications of *Maslahah* according to their proximity to, or validation by, textual evidence?
7. What were the major fears of those scholars who were opposed to the validity of *al-Masalih al-Mursalah*?
8. List 3 main conditions accepted by most schools for the validity of *al-Masalih al-Mursalah*.

⁴¹⁵ The entire passage is extracted from Tariq Ramadan, op. cit.

LESSON 37: APPLICATION OF *MAQASID* AMONG THE *SAHABAH*

The history of the idea of speculating a certain underlying purpose, aim, or intent of Qur’anic or prophetic instructions goes back to the Companions (*Sahabah*) of the Prophet⁴¹⁶, as narrated in a number of incidents listed below:

- 1. Not Praying ‘*Asr* until arrival at Banu Qurayzah:** One clear and popular example is the multi-chained hadith of ‘afternoon prayers at Banu Qurayzah,’ in which the Prophet (ﷺ) sent a group of Companions to Banu Qurayzah⁴¹⁷ and ordered them to pray their afternoon (‘*asr*) prayer there.⁴¹⁸ The span of time allowed for ‘*asr* prayers had almost expired before the group reached Banu Qurayzah. Thus, they found themselves divided into supporters of two different opinions. One opinion entailed praying at Banu Qurayzah’s territory anyway and the other opinion entailed praying on the way (before the prayer time was over). The rationale behind the first opinion was that the Prophet’s instruction was clear in asking everybody to pray at Banu Qurayzah, while the rationale of the second opinion was that the Prophet’s ‘purpose/intent’ of the order was to ask the group to hasten to Banu Qurayzah, rather than ‘meaning/intending to’ postpone prayers until after its due time.

According to the narrator Abdallah bin ‘Umar, when the Companions later narrated the story to the Prophet (ﷺ), he did not denounce any of the two positions. The tacit approval of the Prophet, as jurists and Imams have noted, indicates the permissibility and respect for both views. Interestingly, the major jurist who disagreed with the position of those Companions who prayed on the way was **Ibn Hazm al-Zahiri** (“the literalist”), who

⁴¹⁶ For more details on this section, see Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.9-11. See also, Mohammad Hashim Kamali, *Maqasid al-Shari’ah, Ijtihad and Civilizational Renewal*, Occasional Papers Series 20, IIIT London and IAIS Malaysia, 2012, p.10-15.

⁴¹⁷ Around the 7th Islamic year AH. The location was a few miles away from Madinah. Cited in Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.9-11.

⁴¹⁸ *Sahih al-Bukhari*, e.d. Mustafa al-Bagha, 3rd ed. Dar Ibn Kathir, Beirut, 1986, vol.1, p.321; Abu al-Hussain Muslim, *Sahih Muslim*, ed. Mohammad Fouad Abdul Baqi, Dar Ihyah al-Turath al-‘Arabi, Beirut n.d. vol.3, p. 1391. Cited in Jasser Auda, op cit.

wrote that they should have prayed the afternoon ('Asr prayer) after they reached Banu Qurayzah even if they were to arrive after midnight.⁴¹⁹

2. 'Umar and the Spoils of War: Another incident, which shows a more serious consequence of taking a 'purpose-oriented' approach to the Prophetic instructions occurred during the days of 'Umar, the second caliph. The status of 'Umar in Islam, and his continuous and wide-ranging consultations with a large number of Companions, make his opinions of special significance. In this incident, the Companions asked 'Umar, to distribute the newly 'conquered' lands of Egypt and Iraq amongst them as some sort of 'spoils of war.' The argument relied on the clear and specific verses of the Qur'an that allowed fighters their 'spoils of war'.⁴²⁰ 'Umar refused to divide the cities and provinces amongst the Companions by referring to other verses with more general expressions, stating that God has a 'purpose' of 'not making the rich dominate wealth.'⁴²¹ Therefore, 'Umar (and the Companions who supported his opinion) understood the specific wording of the verses of 'spoils of war' within the context of a certain purpose (*maqsid*) of the law. The purpose in this case was diminishing the difference between society's economic strata.

A third example is from 'Umar's application of the law (*fiqh*) is when he did not apply the 'apparent meaning' of the hadith that clearly gives a soldier the right to the spoils of war from the opponents.⁴²² He decided to give soldiers only one-fifth of these spoils, if they were 'significantly valuable,' the purpose being to achieve fairness amongst soldiers and enrich the public trust rather than enrich only a segment of the population.

3. Moratorium on the *Hadd* Punishment for Theft: Another example is 'Umar's application of a moratorium on the (divinely sanctioned *hadd*) punishment for theft

⁴¹⁹ Ali bin Ahmad bin Hazm, *al-Ihkam fi Usul al-Ahkam*, Dar al-Hadith, Cairo, 1404, vol.3, p.291, and vol.5, p.69; Cited in Jasser Auda, op. cit.

⁴²⁰ Ya'qub Abu Yusuf, *al-Kharaj*, al-Matba'ah al-Amiriyyah, Cairo, 1303 AH, p.12 and 81; Yahya Ibn Adam, *al-Kharaj*, al-Maktabah al-Ilmiyyah, Lahore, Pakistan, 1974, p.110. Cited in Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.9-11.

⁴²¹ Qur'an 59:7

⁴²² Al-Walid ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, Dar al-Fikr, Beirut, n.d. vol. 1, p.291; Cited in Jasser Auda, op cit.

during the famine of Madinah.⁴²³ He thought that applying the punishment prescribed in the scripture, while people were in need of basic supplies for their survival, went against the general principles of justice, which he considered more fundamental to the *Shari'ah*.

- 4. 'Umar and Zakat on Horses:** Another example is 'Umar's decision to include horses in the types of wealth included in the obligatory charity of *zakah*, despite the Prophet's clear instructions to exclude them. 'Umar's rationale was that horses at his time were becoming significantly more valuable than camels, which were specified for *zakah* by the Prophet.⁴²⁴ In other words, 'Umar understood the 'purpose' of the *zakah* as a form of social assistance that is paid by the wealthy for the sake of the poor, regardless of the exact types of wealth that were mentioned in the prophetic tradition.⁴²⁵

Interestingly, all known Schools of Juristic Thought, except the Hanafi, are opposed to such expansion of 'the pool of charity,' which illustrates how strong an influence literalism had on traditional juridical methods. Ibn Hazm, again, asserted, "there is no *zakah* on anything except the eight types of wealth that are mentioned in the tradition of the Prophet, namely gold, silver, wheat, barley, dates, camels, cows, sheep and goats. There is no *zakah* on horses, commercial goods, or any other type of wealth."⁴²⁶ Such opinions have the disadvantage of hindering the institution of *zakah* from achieving any meaningful sense of justice or social welfare.

Based on a "methodology that considers the wisdom behind the rulings," Qaradawi rejected classical opinions such as those of Ibn Hazm's, in his very detailed study of *zakah*. He wrote, "*Zakah* is due on every growing wealth... The purpose of *zakah* is to help the poor and to serve the public good. It is unlikely that The Legislator aimed to put this

⁴²³ Mohammed Biltaji, *Manhaj 'Umar Ibn al-Khattab fi al-Tashri'*, 1st ed. Dar al-Salam, Cairo, 2002, p. 190. Cited in Jasser Auda, op. cit.

⁴²⁴ Kamal al-Din Al-Siwasi, *Sharh fath al-Qadir*, vol. 2 p.192; Abu 'Umar bn 'Abd al-Barr, *al-Tamhid*, ed., Mohammed al-Alawi and Mohammed al-Bakri, Wazarah 'Umum al-Awqaf, Morocco, 1387 AH, vol. 4, p. 216. Cited in Jasser Auda, op cit.

⁴²⁵ Yusuf al-Qaradawi, *Fiqh al-Zakah*, Ph.D.dissertation, al-Azhar University, 15th ed., published by al-Risalah, Egypt, 1985, vol. 1, p.229.

⁴²⁶ Opinion strongly expressed in: 'Ali ibn Hazm, *al-Muhallah*, ed. LajnahIhiyah' al-Turath al-Arabi, 1st ed. Dar al-Afaq, Beirut, n.d. p. 209.Cited in Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.9-11.

burden on owners of five or more camels (as Ibn Hazm had said), and release businessmen who earn in one day what a shepherd earns in years...”⁴²⁷

A careful study of the rulings and opinions (*fatwas*) of the Companions therefore, shows clearly how the consideration for and application of *maqasid* played a major role in their understanding of “applied-Islam” and jurisprudence under changing circumstances.

DISCUSSION QUESTIONS:

1. Discuss 3 examples of the application of the concern for *Maqasid al-Shari’ah* in the actions of the Companions of the Prophet (ﷺ).
2. In the examples given in this Lesson, which *Maqasid* “safety net” tools (or “Secondary Sources” of law) can you identify as being used by the Companions?
3. Mention any 3 more examples of the application of or concern for *maqasid* during the time of the Prophet.

⁴²⁷ Yusuf al-Qaradawi, “*Fiqh al-Zakah*”, vol. 1, p. 146-148, Cited in Jasser Auda, op cit.

LESSON 38: MAQASID IN IBADAT AND MU'AMALAT

The purpose-oriented approach demonstrated by the Companions does not necessarily apply to all actions under *Shari'ah*.

Imam Bukhari narrates that 'Umar was asked, "Why do we still jog around the *Ka'bah* with our shoulders uncovered even after Islam has prevailed in Makkah?" The question related to circumstances after the 'conquest of Makkah,' when the people of Makkah claimed the Prophet and his Companions lost their health during their prolonged stay in Madinah. The Prophet (ﷺ) therefore ordered his Companions at the time to jog around the *Ka'bah* in a show of strength. 'Umar, however, did not take a purpose-oriented approach to this question. He answered, "We do not cease doing anything we used to do at the Prophet's time."⁴²⁸ In view of the different responses of 'Umar to the *Sunnah* of the Prophet, 'Umar made a distinction between 'acts of worship' (*ibadat*) and worldly transactions' (*mu'amalat*).⁴²⁹

Imam al-Shatibi expressed this distinction when he wrote, "Literal compliance is the default methodology in the area of acts of worship (*ibadat*), while the consideration of purposes is the default methodology in the area of worldly dealings (*mu'amalat*)."⁴³⁰ Therefore, in general, the area of 'acts of worship' (*ibadat*) should remain a fixed area in which the believer refers to the literal example of the Prophet and does not assume he or she can ascertain the exact purpose in order to make circumstantial changes. However, in the various areas of 'social transactions' (*mu'amalat*), believers may follow the approach of the Companions in being flexible and applying the principles and '*maqasid*' of the *Sunnah*.⁴³¹

While most scholars of *Maqasid* are usually ready to discuss the wisdom behind most actions in the areas of *mu'amalat*, they generally prefer not to dwell on the wisdom behind acts of *ibadah* and *aqidah*, as the reason or wisdom behind some of these are not necessarily obvious and may not have been clearly presented by the Qur'an and *Sunnah*. Most of the issues under *mu'amalat*

⁴²⁸ Sahih Al-Bukhari, *Kitab al-Hajj, Bab al-Raml*.

⁴²⁹ *Zakat* for example contains some aspects that more related to *ibadat*, and other aspects that are more related to *mu'amalat*.

⁴³⁰ Al-Shatibi, *al-Muwafaqat fi Usul al-Shariah*, vol. 2, p.6.

⁴³¹ This whole section was taken with slight modifications from Jasser Auda, *Maqasid al-Shariah: A Beginner's Guide*, IIIT, London, 2008, p.13.

are more easily rationalized and the reasons for them are more obvious. According to **Ibn Rushd**, the *maqasid* of devotional acts of worship (*ibadat*) are generally for greater spiritual growth and closeness to Allah.⁴³² A number of classical and contemporary scholars have discussed many benefits of various acts of *ibadah* in their writings.⁴³³ Some of the *maqasid* of specific injunctions in the *Shari'ah* are, nonetheless, 'beyond our present reasoning' and best known to Allah. Some of these 'wisdoms' are also better known to specialists in the particular fields concerned.⁴³⁴

Examples of Fundamental *Maqasid al-Shari'ah*

Shari'ah is interested in the **preservation** and **enhancement** of the dimensions of human and ecological existence.⁴³⁵ We have cited only a few of the textual references where these are mentioned, and from which various scholars have deduced the conclusion that these are indeed **textually established and valid *maqasid*** of *Shari'ah*.

Some texts of the Qur'an and Hadith are specific in expressing a particular objective of *Shari'ah*, while others are loaded with direct indications of a number of these *maqasid*. For example:

Allah (S.W.T) said: *"And those who **do not invoke any other deity (or god) besides Allah; nor kill such persons as Allah has forbidden, except for just cause; nor commit illegal sexual intercourse; and whoever does these shall receive punishment. The torment will be doubled to him on the Day of Resurrection and he will abide therein in disgrace, except those who repent..."*** (Q25:68-70).

⁴³² See Shaykh Abdallah Bin Bayyah, *The Legal Philosophy of Islam (Qawa'id al-Fiqhhiyyah)*, trnsl. Hamza Yusuf, CD lecture series in Zaytuna Institute, Al-Hambra Productions, California, USA., 2000; In a number of verses of the Qur'an and hadith, the purpose of *ibadah* or certain acts of *ibadah* are associated with developing greater God-consciousness (*taqwah*) – See Qur'an 2:21, 2:183, 2:197, etc.

⁴³³ See Jasser Auda, *Maqasid al-Shari'ah: A Beginner's Guide*, IIIT, London, 2008, p.14-17; Abu Hamid al-Ghazzali, *Inner Dimensions of Islamic Worship*; Musharraf Hussain, *The Five Pillars of Islam*, Kube Publishing, 2012; etc.

⁴³⁴ Scholars (both Muslims and non-Muslims) of fields such as Positive Psychology, Social Psychology, Sociology, Medicine, Human Ecology, Economics, Neuro-Science, etc. often have very interesting and insightful possible reasons or "wisdoms" behind some religious or *fiqh* rulings related to *mu'amalat*, *aqidah* and to some acts of *ibadat* such as fasting, meditation (*dhikr*), Qur'anic recitation, prayer, charity (*zakat*), Hajj, etc. These fields of inquiry can assist Muslims in helping others (and themselves) appreciate better the guidance and mercy of Allah in His injunctions. This is critical for those involved in *da'wah* work or inter-faith engagement.

⁴³⁵ There are therefore no specific limits to the number of *Maqasid al-Shari'ah* according to scholars such as Ibn Taimiyyah and al-Shatibi (Al-Asimi, Saleh ibn Abdullah, *Tatrizala Al-Islam din al-Kamil*, p.29). According to Ibn Taimiyyah, the number of specific *maqasid* is open-ended and evolving. See Ibn Taimiyyah, *Majmu' al-Fatawa*, 32:134, cited in Mohammad Hashim Kamali, *Maqasid al-Shari'ah, Ijtihad and Civilizational Renewal*, Occasional Papers Series 20, IIIT London and IAIS Malaysia, 2012, p.34.

Narrated by ‘Ubada bin Al-Samit, who took part in the Battle of Badr and was a *Naqib* (a person heading a group of six persons) on the night of the Al-Aqaba pledge: “Allah’s Apostle said while a group of his companions were around him, ‘swear allegiance to me: **Not to join anything in worship** along with Allah; **not to steal**; **not to commit illegal sexual intercourse**; **not to kill your children**; **not to accuse an innocent person** (or to spread such an accusation among people); not to be disobedient (when ordered) **to do good deeds**.’ The Prophet (ﷺ) then added: ‘Whoever among you **fulfills his pledge** will be rewarded by Allah. And whoever indulges in any one of them and gets the punishment for it, it is expiation for that sin. And if one indulges in any of them, and Allah conceals his sin, it is up to Him to forgive or punish him (in the hereafter).’” ‘Ubada bin al-Samit added: “So we swore allegiance for these (to Allah’s Apostle).”⁴³⁶

The above 2 texts contain a listing of several objectives (*maqasid*) of Shari’ah related to the **Protection of Faith (*deen*)** such as through the prohibition of *Shirk* – “do not invoke any other deity (or god) besides Allah” and “not to join anything in worship along with Allah”; the **Protection of Life (*nafs*)** through the prohibition of murder – “nor kill such persons as Allah has forbidden”; the **Protection of Honour/Dignity (*ird*)** – “not to accuse an innocent person”; the **Protection of Family (*ahl*), lineage (*nasl*) and Progeny (*nasab*)** through prohibition of extra-marital sexual relations – “nor commit illegal sexual intercourse”; the **Protection of Property (*maal*)** through prohibition of theft - “not to steal”; **Promotion of and Enjoining Goodness** – “do good deeds”, “...fulfills his pledge”, etc.

Some of the more thematic or specific categories of objectives (*maqasid*) and their supporting textual references include the following:⁴³⁷

1. Promotion and Protection of Faith (*deen*) and God-consciousness (*taqwa*):

⁴³⁶ *Sahih al-Bukhari*, Kitab al-Iman, no.17

⁴³⁷ For more examples and elaborate discussions on this subject, see Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari’ah*, IIIT, London, 2006; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008; Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation*, OUP, Oxford, 2009; Gamal Eldin Attia, *Towards Realization of the Higher Intents of Islamic Law: Maqasid al-Shari’ah, A Functional Approach*, IIIT, London, 2007; Ahmad Al-Raysuni, *Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law*, IIIT, London, 2005; al-Shatibi, *al-Muwafaqat*; Shah Waliyullah al-Dahlawi, *Hujjatullah al-Balighah*; al-Qarafi, *Anwar al-Buruq fi anwa’i al Furuq*.

(Freedom of religion for all): “*Let there be no compulsion in religion*” - Q2:256; The prohibition of worshipping any other than Allah, and of associating partners with Him (*Shirk*) - Q3:64, 16:36, 4:36, 2:256; (Need to follow Islam): “*Indeed, the religion acceptable in the sight of Allah is that of Submission to His Will (Islam) ...*” (Q3:19); “*... This day I have perfected for you your religion and completed my favour upon you, and I have chosen for you submission (Islam) as your religion*” - Q5:3; (Importance of *da’wah*): “*Invite to the way of your Lord, with wisdom and beautiful preaching.*” - Q16:125; punishment (in the hereafter) for apostasy by Allah - Q20:124; establish the performance of prayer (*Salat*) - Q29:45; there are other references that encourage fasting, pilgrimage, meditation (*dhikr*), Qur’anic recitation, and other devotional acts of worship as a means of also increasing “God-consciousness” (*taqwah*); Muslims are also allowed to fight back if necessary, against those who fight them because of their faith etc.

All these teachings and laws, and many more, strengthen the fact that the protection and preservation of religion (*deen*), and people’s right to their own faith is a definite (*qat’i*) *maqasid* of Shari’ah.

2. Enhancement and safe-guarding of life (*nafs*), health and security

Some relevant textual indicants of this *maqasid* include: Allah (S.W.T) said: “...if anyone saves a life, it would be as if he saved the life of all mankind.” - Q5:32; the existence of a punishment (by equitable retribution or *qisas*) for bodily harm or murder - Q2:178-179; blood-money “compensation” (*diyya*) for injury or taking a life - Q4:92; the permission to do everything necessary, including going to war to protect the lives of innocent people and the weak; the numerous hadith encouraging the search for cures to various illnesses; the importance of quarantine and the prohibition of going in or out of a site of a plague or epidemic; the relaxation of laws due to hardship or suffering; the promise of Paradise for those who die or are killed in the struggle to save others; the prohibition of suicide; prohibition of consuming dead animals; encouragement of cleanliness of self and environment, etc.

The value of human life is also expressed in the following hadith: Abdullah bin Umar said: “I saw the Prophet (ﷺ) doing *tawwaf* around the *Ka’abah* saying, ‘How sweet are you and how sweet your scent is. How great are you and how great is your sanctity. But by the One in Whose hand is the soul of Muhammad, the sanctity of a Believer is greater

with Allah than your sanctity’.”⁴³⁸ Imam Ahmad b. Hanbal narrated in his *Musnad* from ‘Abd Allāh bin ‘Amr bin al-‘Ās (RA) who reported that a man said, ‘O Messenger of God! What [person’s] Islam is best?’ The Prophet (pbuh) replied, ‘The one from whose tongue and hand all people are safe.’⁴³⁹ The Prophet Muhammad (pbuh) said: ‘The true believer (mu’min) is he whom people trust with regard to their lives and their properties’⁴⁴⁰ ‘Abd Allah b. Umar (RA) reported that the Prophet ﷺ said, ‘Anyone who kills a non-Muslim under peace treaty [mu’ahad] will not smell the fragrance of Paradise, even though its fragrance can be smelt at a distance of forty years.’⁴⁴¹ Abu Bakra (RA) reported that the Prophet ﷺ said, ‘Any Muslim who unjustly kills a non-Muslim with whom there is a peace treaty [mu’ahad], God will make Paradise forbidden for him.’⁴⁴²

All these, and more, contribute to the certainty that the enhancement and preservation of life, health and security for all are definitive objectives of Shari’ah.

3. Protection and enhancement of the mind (*‘aql*) and education

The protection and enhancement of the mind is indicated in numerous textual references such as those associating Satan with intoxicants and intoxication.

For example Allah said: “O you who believe...Satan only wants to cause between you animosity and hatred through intoxicants and gambling, and to avert you from the remembrance of Allah and from prayer. So will you not desist?” (Q5:90- 91) This indicates a reason for the prohibition and punishment of consumption of alcohol, intoxicants and narcotics; the obligation on every Muslim (male or female) to search for knowledge; the recommendation to “ask those who know” if we do not know; the Qur’anic condemnation for those who “do not think” or “do not use their minds”; the praise for those who “learn”, “contemplate”, “think”, “discern”, and “reason”, etc. - Q20:114 Q58:11, Q35:28; the many statements that mention that the understanding of God’s signs and messages are for those who “think”, and “ponder”; the command to travel the earth in search of knowledge; the praise for knowledge, scholarship and those who act on and teach others

⁴³⁸ Ibn Majah, no.3932

⁴³⁹ Ahmad b. Hanbal

⁴⁴⁰ Ibn Majah, Ahmad

⁴⁴¹ Al-Bukhari, Ibn Majah

⁴⁴² Al-Nasa’i, Abu Dawud and Ahmad

what they know; the recommendation to pray to God for “useful knowledge” and seek protection from worthless information; the recommendation to consult and reach the best decisions; the prohibition of sending scholars to the battlefield; the automatic forgiveness due to children, the insane, etc.

4. Promotion and protection of the family (*ahl, nasal* and *‘ird*)

The promotion and protection of marriage and family life as objectives of Shari’ah are clearly seen from the many teachings of the Qur’an and Sunnah on the encouragement of marriage (Q4:3) and prohibition of extramarital sex (Q24:2, Q25:2); severe punishment of unproven accusation of adultery (*zina*) and the protection of family honour; disclosing the true lineage of orphans; respecting family ties of kinship - Q4:1; the guidelines for greater fairness and equity in all marriage relations; guidelines for pre-marital counselling; the discouraging of divorce and recommending amicable divorce settlement if divorce is inevitable (Q86:1); the prescription for a “waiting (*iddah*) period” for reconciliation before a divorce is final; giving of rights to spouses and children; prohibition of deception or injustice before or during marriage; the permissibility of marriage contracts; prevention and punishment of domestic abuse; regulation of polygamy; moral guidelines for gender interaction; attributing reward to acts of love and intimacy within the family; describing some of the objectives of marriage as related to tranquility (*sakinah*), compassion (*rahma*) and love (*mawaddah*); encouraging the having of children and respecting their rights; injunctions related to the caring and respecting of parents and the elderly, etc.

5. Preservation and promotion of building and distributing wealth (*maal*)

The enhancement and protection of wealth is seen in some of the following texts that describe the giving “upper hand” as being better than the receiving “lower hand”; respect for private ownership of wealth; the prescription to strive in the distribution of wealth through various means such as *zakat*, charity, endowments, gifts, inheritance, bequests, etc. and be rewarded for it (Q3:180, 41:6-7, 9:34-35); the encouragement of a work ethic, self-reliance and hard work; the promising of Paradise to the “honest merchant”; the prohibition and severe punishment of theft and brigandage or highway robbery (Q5:38, 5:33); the prohibition of all exploitative or unfair business arrangements, of *riba* (Q3:130, 2:275); of gambling and cheating (Q5:90-91, 2:118); of wastefulness and extravagance (Q17:27); of hoarding and creating artificial scarcity, of manipulating weighing

instruments and prices; reward for legitimate work; the severe punishment in the hereafter of one who usurps the land of another; the relaxation of payment of zakat on wealth that is circulating or put to productive use; the need to cater for orphans and set up social security systems; Hajj as being “for those who can afford it”, etc.

6. Promotion of social cohesion, unity and brotherhood

This is evident in the texts of the Qur’an and Hadith that encourage and reward congregational activities such as eating, praying, travelling, consulting with others; respect for constituted authority and leadership; discouragement of arguments and disputes; encouraging greetings of peace, visiting the sick, giving gifts, etc.; encouraging compassion and forgiveness; the commandments to “hold onto Allah’s rope together and not be disunited”; the command to “cooperate in doing good”; *“The believers are but brothers, so make settlement between your brothers”* - Qur’an 49:10; *“Indeed this your religion, is one religion, and I am your Lord, so worship Me”* - Qur’an 21:92 and 3:104; the importance of and preference for amicable agreements (*sulh*); the promotion of congregational acts of worship such as fasting in Ramadan, pilgrimage and Friday prayers, etc.; hadith stating, “It is better to be in good company than to be alone”; permitting inter-faith marriages in some instances; permitting eating of the food of “People of the Book”; racial, cultural and ethnic diversity as a divine sign, and as being for the purpose of better “mutually understanding each other”, etc.

7. The promotion and protection of justice, fairness and equity

This definitive “universal *maqasid*” is based on texts such as, *“O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearest to righteousness...”* (Qur’an 5:8); *“...so judge between the people in truth and do not follow (your own) desire...”* (Qur’an 38:26); *“Woe to those who give less [than is due]. Who, when they take a measure from people, take in full. But if they give by measure or by weight to them, they cause loss.”* (Q83:1-3); the numerous other prohibitions of injustice and certain forms of speculation (*gharar*) in all dealing; Prohibition of cruelty to animals; the prohibition of oppression (*zulm*) and cheating; The “major sins” associated with bearing false witness

and other forms of injustice; Allah tolerating polytheism (*shirk*) but not injustice; The Prophet (ﷺ) saying the prayer of the victim of injustice is answered by Allah even if he or she was an idol worshipper; Prophet (ﷺ) saying he would even be ready to punish his beloved daughter, Fatima, if she was guilty of theft; The idea of “inter-generational” justice and injustice; See also Qur’an 16:90 and Qur’an 49:9.

8. The preservation and enablement of ease, facilitation (*taysir*) and magnanimity (*samahah*)

Another example of definitive (*qati’*) Shari’ah objectives is what can be derived from those Qur’anic indicants which occur so frequently that they cannot be mere metaphors or hyperboles, such as “facilitation” (*taysir*). God has said: “God wills that you shall have ease, and does not want you to suffer hardship” (2:185). The emphasis expressed by the sentence “and does not want you to suffer hardship” after the phrase “God wills that you shall have ease” makes the connotation of this verse close to that of explicit and unambiguous meaning.

To this we can add the following verses: “and [He] has laid no hardship on you in [anything that pertains to] religion” (22:78); “O our Sustainer! Do not lay upon us a burden such as that which you do lay upon those who lived before us! O our Sustainer! Make us not bear burdens which we have no strength to bear!” (2:286); “God wants to lighten your burdens” (4:28); See also Qur’an 4:101; 2:187, 4:28, etc. There are some hadith related to this objective cited in Lesson 30.

9. Protection and enhancement of the environment, earth’s life-supporting systems

Maqasid in its present more articulated form is deduced from numerous teachings in the Qur’an and Sunnah related to the environment and our responsibilities towards other living and non-living things. They include for example, the instruction for Prophet Nuh (p) to save other species of animals; prohibition of using the skin of wild animals; encouragement of tree planting even at the Last Hour; prohibition of cruelty to animals; prohibition of killing animals you are not going to eat; the teaching that other animals constitute communities (*ummah*) similar to humans (6:38); prohibition of defecating on pathways; teachings regarding cleanliness and purity of self and surroundings; prohibition

of urinating in (or polluting) water; prohibition of destruction of trees even during warfare; encouraging the study of nature and Allah's creation; reminders of responsibility and accountability for use of all resources; reminders of gratitude for Allah making nature subservient to us; chapters of the Qur'an named after animals; prohibition of wastefulness (25:67, 17:26-27); reminders of our stewardship (*khilafah*) on earth; the Prophet (ﷺ) said, "All creatures are God's dependents and the best among them is the one who is most useful to God's dependents"; etc.

Other major *maqasid* of Shari'ah include compassion (*rahma*), freedom and liberty (*hurriyyah*) from oppression and injustice; excellence, professionalism and perfection (*'itqan* and *ihsan*); protection of animal rights; poverty eradication, etc.

The United Nations uses the **Human Development Index (HDI)** in assessing the level of progress in social justice and development of various countries. This index measures the extent to which these countries have met the objectives (*maqasid*) of "Human Development" according to the UN standards. Contemporary Muslim thinkers have raised important questions such as, 'What indices or alternatives ways for measuring human or societal progress can Muslims develop in measuring the attainment of our *maqasid al-Shari'ah* in Muslim societies?'⁴⁴³ Some regard the HDI as a good-enough starting point, considering it "as a contemporary expression of *maslahah*, which could be measured empirically via the UN "human development targets".⁴⁴⁴ As this field continues to develop, it is expected that answers to these questions will be intellectually debated over the coming years.

DISCUSSION QUESTIONS:

1. Explain the implications and possible justification for Imam Al-Shatibi's statement:

⁴⁴³ See Jasser Auda, *Maqasid al-Shari'ah: A Beginner's Guide*, IIIT, London, 2008, p.26-27.

⁴⁴⁴ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.249

“Literal compliance is the default methodology in the areas of acts of worship (*ibadat*), while the consideration of purposes is the default methodology in the area of worldly dealings (*mu’amalat*).”

2. Why are some scholars uncomfortable discussing the *maqasid* in acts of devotion (*Ibadah*) but do not mind discussing some of their benefits?
3. List any 10 explicitly clear *maqasid* of *Shari’ah*, along with textual evidence to validate them.
4. In light of the *maqasid* of *Shari’ah*, discuss what possible indicators of social progress and development would you propose for measuring societal progress in any community from an Islamic perspective?
5. Considering the meaning of *maqasid al-Shari’ah* and the evidence for their validity, discuss those sources of *Shari’ah* or tools of *Ijtihad* that have a role in protecting the *maqasid al-Shari’ah*.

LESSON 39: ANSWERING “WHY”

Preceding lessons explained how scholars might arrive at their final verdicts (*fatwa* and *Fiqh* values - i.e. *Fard*, *Mubah*, *Haram*, etc.) on various issues. Yet in an increasingly sceptical global society where every assertion, belief, superstition, formula and equation in every field, is under question and critical examination, it has become necessary for Muslims to be able to also go beyond textual justifications for verdicts and cite the wisdom, objectives (*maqasid*) of *Shari’ah* and the universal values behind them (that are also often based on the Qur’an and *Sunnah*).

In other words, it is becoming increasingly important for those involved in communicating the message of Islam(*da’wah*) to explain the ‘why’ behind their beliefs and actions. The ‘reasons why’ usually become broader as they progress up abstract ‘levels’ of purpose or wisdom.

Below are 5 “Levels of Why”. Each subsequent level can be used to justify and explain the level preceding it.⁴⁴⁵ Some of these levels may also overlap.

1. Level of Simple Actions— *halal* and *haram*; *fatwa* and *fiqh*.

E.g. “Stop at the red traffic light because it’s the law!”

2. Level of Authority and Certainty of laws— Qur’an, *Sunnah* and *Usul al-Fiqh*.

E.g. “Stop at the red traffic light because the law has global application, constitutional backing, and you will be fined if you do not respect it.”

3. Level of Benefits (*Maslahah*) or Objectives (*Maqasid*) of *Shari’ah* – Promotion of the common good and benefit (*maslahah*), and the avoidance of harm (*mafsada*).

E.g. “...because not stopping at the red traffic light risks hurting others as well as yourself!”

4. Level of Values (and ‘Universal *Maqasid*’) – justice, compassion, love, truth, consideration, freedom, rights, service, responsibility, etc. This is the level of ‘self-evident truths’, where the opposite values (injustice, cruelty, hatred, falsehood, etc.) would generally be considered unacceptable for the good and sustainable running of any

⁴⁴⁵ Adapted from Jasser Auda, *Maqasid al-Shari’ah: A Beginner’s Guide*, IIIT, London, 2008, p.1-2.

community. This is the level of ‘universal *maqasid*’ which other more ‘partial’ or ‘specific *maqasid*’ should not contradict.

E.g. “...because we believe in justice, equal rights to use the road, consideration, and the right of every road user to life. All these must be protected!”

5. Level of Trust and Submission to Allah’s wisdom - Allah cares and knows best and we trust and have faith in His guidance through His Prophets (ﷺ).

E.g. “...because it is by these values that the Most Merciful and All-Wise Creator wants us to live our lives and regulate our societies. We trust in that all-encompassing wisdom.”

While justifying the Level of Simple Actions by using evidence from the Level of Authority and Certainty may be sufficient for some believers, others may view this approach as dogmatic and unacceptable as this approach is easily used by people of all faiths – “My Scripture says this; my Master says that!” It is not seen as a more convincing argument. It may also not give the certainty, appreciation and peace of conscience⁴⁴⁶ that some derive from the additional evidence of the wisdom, rationale, benefits that are derived from the Levels of Objectives and Universal Values which most followers of other religions and ideologies would more easily relate to. **Imam al-Shatibi** said,

The *Ummah* (meaning the Muslim community of believers) and all faiths have agreed that *shara’i* (legal statutes) are there to protect the necessary basics: religion, the soul (life), posterity, property and the mind.⁴⁴⁷

There are of course those wisdoms that are beyond us and known only to Allah. So, just as we can submit to the wisdom of a doctor or engineer, we also fully submit to Allah once we are sure the prescription is definitely from Him and clearly understood, even if we are not sure of the reasons why. For believers who accept with absolute certainty the revelation of the Qur’an and divinely guided example of the Prophet (ﷺ), the final Level of Trust is the ultimate answer to ‘Why’.

⁴⁴⁶ Prophet Ibrahim (peace be upon him) wanted such peace when he asked Allah for more proof in order to have greater certainty of Allah’s ability to give life to the dead. He explained that it was “*to satisfy my heart*” – Qur’an 2:260

⁴⁴⁷ Abu Ishaq al-Shatibi, *al-Muwafaqat*, vol. 1, p. 15, cited in Deina AbdelKader, *Social Justice in Islam*, IIIT and Goodword, New Delhi, 2003, p.60

DISCUSSION QUESTIONS:

1. Discuss, with an example, 5 possible “levels of why” when it comes to asking for the wisdom or reason why a particular command or recommendation is prescribed by the Qur’an, *Sunnah* or any other source of *Shari’ah*.
2. Why is seeking the wisdom and rationale behind the commands of Allah or of His Prophet (SAW) not regarded unacceptable or as a sign of weakness of faith?
3. In what ways is an understanding of *al-maqasid* important in interfaith engagements and dialogues?
4. When would it be wiser to accept an injunction of the Qur’an or *Sunnah* even if the reason or wisdom is not clear or sufficiently convincing?

LESSON 40: SCHOLARS’ ENDORSEMENTS OF *MAQASID*

Ibn Qayyim al-Jawziyyah

*The foundation of the Shari'ah is wisdom and the safeguarding of people's welfare in this life and the next. In its entirety it is about **justice, mercy, wisdom, and good**. Every rule which replaces justice with injustice, mercy with its opposite, the common good with mischief, and wisdom with folly, is a ruling that does not belong to the shari'ah, even though it might have been claimed to be according to some interpretation...*⁴⁴⁸

Al-Izz ibn Abd al-Salam

*When you study how the purpose of law brings good and prevents mischief, you realise that it is unlawful to overlook any common good or support any act of mischief in any situation, even if you have no specific evidence from the script, consensus, or analogy.*⁴⁴⁹

*Every action that misses its purpose is invalid.*⁴⁵⁰

Imam Abu Ishaq al-Shatibi

*Since it is established that the rules of the Shari'ah aim to serve human interest, it follows that human actions should be on its basis.... When an act is legitimate in both essence and appearance, no difficulty arises. However, if an act is consistent [with the law] in appearance yet contrary to human interests, it is invalid, and anyone who acts contrary to human welfare is engaged in an illegitimate exercise.*⁴⁵¹

Ibn Ashur

⁴⁴⁸ Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'in*, vol.1, p.333, cited in Jasser Auda, *Maqasid al-Shari'ah: A Beginner's Guide*, IIIT, London, 2008, p.21

⁴⁴⁹ Al-Izz ibn Abd al-Salam, *Qawa'id al-Ahkam fi Masalih al-Anam*, vol.2, p.160. Cited in Jasser Auda, *Maqasid al-Shari'ah: A Beginner's Guide* IIIT, London, 2008, p.19

⁴⁵⁰ Ibid, p.221.

⁴⁵¹ al-Shatibi, *Al-Muwafaqat*, vol.2, p.385, cited in Mohammad Hashim Kamali, *Maqasid al-Shari'ah, Ijtihad and Civilizational Renewal*, Occasional Papers Series 20, IIIT London and IAIS Malaysia, 2012, p.28.

*The Shari'ah aims at preservation of the world order and regulations of the people's conduct in a way that protects against corruption and collapse. This can only be realized through the promotion of benefits and prevention of harm in all their manifestations.*⁴⁵²

Allal al-Fasi

*[The cardinal purpose of Shari'ah is] To develop and populate the earth and maintain peace and order among people. The well-being of the planet earth and its usefulness for human habitat can be assured through devotion to right conduct by all those who bear the divine trust of vicegerency. It is also to ensure that people act justly towards one another and observe the standards of morality; that they reform all that which need to be reformed, tap the resources of the earth and plan for the common good of all.*⁴⁵³

DISCUSSION QUESTIONS:

1. What is your understanding of the implications of the statements related to the purpose and objectives (*maqasid*) of *Shari'ah* made by the following scholars:
 - a) Ibn Qayyim al-Jawziyyah
 - b) Al-'Izz bin Abd al-Salam
 - c) Abu Ishaq al-Shatibi
 - d) Ibn Ashur
 - e) Al-Fasi

⁴⁵² Muhammad al-Tahir Ibn 'Ashur, *Maqasid al-Shari'ah al-Islamiyyah*, ed. Muhammad al-Tahir al-Messawi, Amman; Al-Basa'ir li al-Intaj al-'Ilmi, 1998, p.171, cited in Mohammad Hashim Kamali, *Maqasid al-Shari'ah, Ijtihad and Civilizational Renewal*, Occasional Papers Series 20, IIIT London and IAIS Malaysia, 2012, p.29.

⁴⁵³ Allal al-Fasi, *Maqasid al-Shari'ah al-Islamiyyah wa Makarimuha*, Maktabah al-Wahdah al-Arabiyyah, Casablanca, n.d. p.3, cited in Mohammad Hashim Kamali, *Maqasid al-Shari'ah, Ijtihad and Civilizational Renewal*, Occasional Papers Series 20, IIIT London and IAIS Malaysia, 2012, p.29-30.

SECTION 7: *MAQASID* AS A COMPASS ON THE MAP OF *USUL AL-FIQH*

LESSON 41: REGULATING *USUL AL-FIQH* THROUGH *MAQASID*

The majority of *hadith* do not elaborate their own historical, political, social, economic, and environmental contexts. The context and implications of such *hadith* are often left to the speculation of the narrator or jurist. Understanding the *maqasid* of *Shari'ah* allows scholars to appreciate the spirit and direction of the *Shari'ah* and think along those lines when developing or reviewing legislation, especially in changing contexts. A 'holistic picture' through the lenses of the *maqasid* also helps scholars overcome the lack of information about the exact contexts of *hadith*.

The *maqasid* may therefore serve as a regulator or criteria for the evaluation of legal rulings obtained through *ijtihad* and interpretation. **Al-Shatibi** also emphasised paying attention to the particular text and context as well as the universal objectives of Islam.⁴⁵⁴

Concern for Consequences: Differentiating the “Means” from the “Ends” of *Shari'ah*

The distinction between the means or instruments (*al-wasa'il*) and the ends (*al-ahdaf*) or purposes (*al-maqasid*) of *Shari'ah* was very important for scholars concerned with *Shari'ah* realizing its goals in society. This was important for many reasons, the most important of which was the protection of the more permanent ends and purposes (or *maqasid*) of *Shari'ah* by ensuring they were not confused with or sacrificed for their less permanent **means or**

⁴⁵⁴ Ahmad Raysuni, *Nazariyyat al-Maqasid 'inda al-Imam al-Shatibi*, Eng. Tr. As *Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, by Nancy Roberts (Herdon, VA, IIIT, 2006), p.17.

“instruments”. It also ensured a way of preventing legal stratagems and tricks that justified forbidden ends through “legal” means.⁴⁵⁵

There is general agreement amongst scholars in their concern for the consequences of actions when determining their legitimacy. Actions that in themselves may be legitimate, but which if allowed would lead to unacceptable or harmful ends (*mafsada*) would either be discouraged or even prohibited. This is referred to as “Blocking the Means” or *Sadd al-Dhara’i*, and is in principle accepted by all the major Schools of Juristic Thought⁴⁵⁶ though some would not regard it as a separate source of legislation.⁴⁵⁷

The justification for this concern for consequences is based on a number of maxims (*qawai’d*) of *Fiqh* that are concerned with the repercussions of actions. These in turn are established by a number of verses of the Qur’an, the hadith, and actions of the Companions (some of which have been cited earlier). These maxims include:

- “Affairs are judged by their purposes” (*Al-umuru bi-maqasidiha*).
- “Hardship begets facility” (*Al-mashaqqah tajlib al-taysir*).
- “Harm must be eliminated” (*Ad-dararu yuzal*).

Other maxims related to these major ones include:

- “Necessity makes the unlawful lawful” (*Ad-daruratu tubiyh al-mahzurah*).
- “A specific harm is tolerated in order to prevent a more general one” (*Yutahammal ad-darar al-khaas li-daf’ al-darar al ‘aam*).
- “A greater harm is eliminated by means of a lesser harm” (*Yuzal ad-darar al-ashaddu bid-darar al-akhaff*).
- “In contracts, effect is given to intention and meaning and not to words and forms”

⁴⁵⁵ For a more detailed discussion of the distinction and classifications of “means” and “ends” of Shari’ah, see Muhammad al-Tahir Ibn ‘Ashur, *Treatise on Maqasid al-Shari’ah*, IIIT London, 2006, p.229-237.

⁴⁵⁶ With the exception of the Zahiri and Shi’a Schools. See Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.126.

⁴⁵⁷ Some Schools of Jurisprudence regard it as a “reasoning procedure” and subsumed it under other tools such as *Istihsan* or *Maslahah*. See *Ibid.*, p.125-127.

- “When forced to choose between evil alternatives, the lesser evil must be sought”.⁴⁵⁸
- “To repel a public damage, a private damage is preferred”.
- “Whatever leads to, or is a prerequisite for a prohibition (haram) is regarded as prohibited (haram) itself” (*Ma yatawaqqafu al-haramu alayhi fa huwa haram*).⁴⁵⁹
- “Whatever is a prerequisite or necessity for an obligation (wajib) is regarded as a wajib itself” (*Ma la yatimmu al-wajibu illabihi fahuwa wajib*).⁴⁶⁰
- “Necessity is measured in accordance with its true proportions” (*Ad-daruratu tuqaddaru bi-qadriha*).

Some scholars, such as **Al-Qarafi**, proposed “Opening the Means” (*Fath al-Dhara’i*) in addition to “blocking” them. He divided rulings into means (*wasā’il*) and ends/purposes (*maqasid*). He suggested that means that lead to prohibited ends should be blocked, and means that lead to lawful and desired ends should be opened. The more the harm or undesirability (*aqbah*) of the ends, the more the means to them should be forbidden. The more beneficial or desirable (*afdal*) the ends are, the more the means to them had to be opened. Those ends that were “in-between” (*mutawassitah*) – neither harmful nor beneficial – were simply lawful.⁴⁶¹

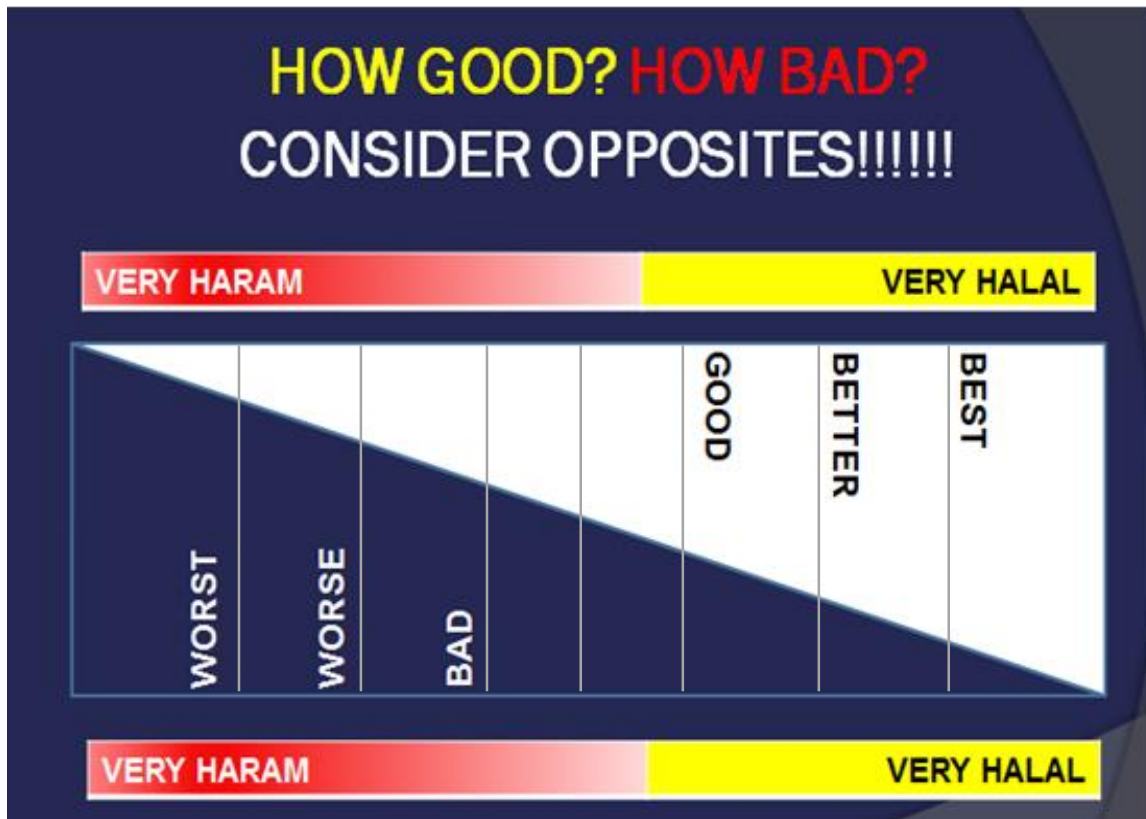
⁴⁵⁸ *Nakhtaru a’la al-maslahtayni wa akhaffu al-dararayni* – “We chose the greater good or lesser evil (when forced to)”.

⁴⁵⁹ Mohammad Hashim Kamali, *Maqasid al-Shari’ah, Ijtihad and Civilizational Renewal*, Occasional Papers Series 20, IIIT London and IAIS Malaysia, 2012, p.30.

⁴⁶⁰ Ibid.

⁴⁶¹ Jasser Auda, *Maqasid al-Shari’ah as Philosophy of Islamic Law*, IIIT, London, 2008, p.241.

The “Over-riding effect” and the degree of harm or benefit



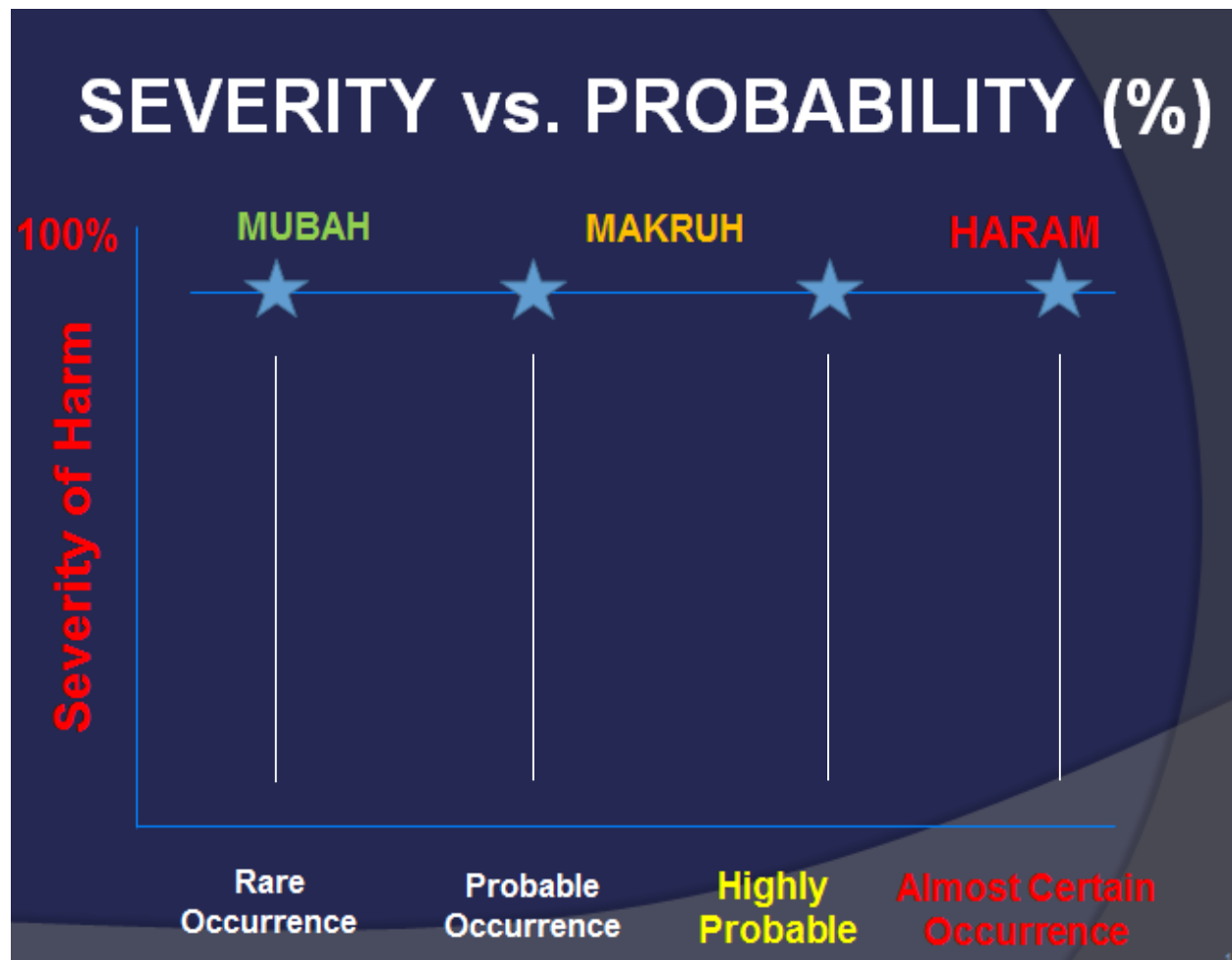
The mere fact that it is possible for a permissible action to lead to an undesirable end does not automatically mean it would be better to prohibit it. Most actions have a mixture of both desirable and undesirable consequences, and side-effects in terms of advantages and disadvantages. These have to be weighed to determine what **the over-riding effect of an action** is, and whether the effect is **significant or insignificant**. If the harm is significant and greater than the benefit, then it would be prohibited. If the benefit is significant and greater, then it would be permitted. If they were both balanced, then most scholars would prefer to err on the side of caution, and regard it as prohibited.⁴⁶²

⁴⁶² This concern for assessing the overriding benefit/harm is equivalent to what is sometimes referred to as an Impact Assessment. This includes Health Impact Assessment, Environmental Impact Assessment, Strategic Impact Assessment, Cumulative Impact Assessment, Cost-benefit Analysis, “Class-benefit Analysis”, etc.

In weighing or assessing the “over-riding effect” of an issue – whether something is “good” or “bad”, or a “greater good” or “lesser evil” - some of the factors that would be considered include the severity or intensity of the harm (or benefit), the scope and number of people affected, who is affected, the duration or permanence of the effect, the reversibility of the effect, and other probable side-effects and consequences, etc. These effects can be determined more quantitatively through various scientific methods depending on the field (e.g. Environmental Impact Assessment, Social Impact Assessment, Health Impact Assessment, etc.). The quantitative and comparative assessment of harms and benefits of alternative options makes it easier to reach a more objective decision.

Some means and instruments relate to facilitating, enabling or even threatening or preventing the attainment of life’s necessities (*daruriyyah*) such as food and shelter; others relate to conveniences and desirables which would be challenging to live without (*hajiyyat*) such as transport, telecommunications and trade; while others are related to luxuries and embellishments (*tahsiniyyat*) such as ornaments and premium-priced recreation. The more essential the ends are, the more important it is to facilitate the means to them. The more harm is associated with particular ends, the more important it is to block the means to their realization.

Severity of Harm and Probability or Risk of Occurrence



Another *Maqasid* consideration that regulates the practice of *Usul al-Fiqh* is **the level of probability/risk of occurrence**. The severity/degree of harm or benefit is, on its own, not sufficient for scholars to decide upon opening or blocking a means. For instance, just because people could die from car accidents on their way to work does not mean it should be prohibited to go to work in a car or near cars. It is also important to assess the level of risk of occurrence, or the probability of there being benefit or harm, when it comes to deciding whether a means or instrument is to be “blocked” or “opened”. “Probability/certainty” of an action resulting in

harm/benefit was divided into 4 broad overlapping levels or categories: “Certain”, “Most Probable”, “Probable” and “Rare”.⁴⁶³

1. Those means that are “**Certain**” to lead to significant harm or prohibited ends are regarded as prohibited. For example, digging a well on a public road. Based on the near-certainty of the expected result of injury to others, the means which leads to that result is equally forbidden. The *ulama* of all Schools of Jurisprudence are, in principle, unanimous on the prohibition of this type of means (*dhari’ah*)(*dhari’ah* here means what exactly?) and a consensus (*ijma`*) is said to have been reached on this point.⁴⁶⁴
2. Those means that would “**Most Probably**” lead to harm (or *haram*) are regarded as *haram* by some and *makruh* by those who prefer greater certainty before declaring an action as *haram*. For example, selling grapes to a wine-maker, or selling arms during a civil unrest.
3. Those means that would only “**Probably**” lead to harm, are regarded variously as either *haram*, *makruh*, or *mubah*, depending on the degree of uncertainty. For example, a woman travelling alone on a relatively “safe” road.
4. Those means that “**Rarely**” lead to a harm are regarded as permitted (*mubah*). For example, selling kitchen knives that may be used for murder, or a woman going to the mosque who might be attacked and violated.

The fact that there is a degree of probability that a means could lead to significant harm is not sufficient to declare it prohibited. There also has to be certainty or high probability of the harm occurring.

In summary, declaring a means or instrument to be *Wajib*, *Haram*, *Mustahab*, *Makruh*, or *Mubah*, etc., depends both on the **significance** or degree of the overriding harm or benefit, and also on the level of “certainty” or **probability** of the harm or benefit occurring.

Depending on the subject at hand, the qualifications required for a thorough assessment of impact and risks require more empirical skills that are not in the hands of most traditional scholars. Fatwa Councils today, therefore, require specialists in specific fields to advise scholars

⁴⁶³ Jasser Auda, *Maqasid al-Shari’ah as Philosophy of Islamic Law*, IIIT, London, 2008, p.125-127.

⁴⁶⁴ Abu Zahrah, *Usul al-Fiqh*, p.228; Abu al-’Aynain Badran, *Usul al-Fiqh al-Islami*, p.243, cited in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, 2003, p.402.

on the consequences and implications of various courses of action and *fatwas*. There is therefore a greater appreciation of the importance of not just “Scholars of the religious Texts” but also “Scholar of the societal Context”.

DISCUSSION QUESTIONS:

1. How does the knowledge of *maqasid* provide a scholar with a more “holistic picture” of *Shari’ah* when dealing with hadith that lack sufficient information about their specific contexts or of the Prophet’s intent on a particular legislation or instruction?
2. In what ways do you think the *maqasid* of *Shari’ah* serve as a regulator or criteria for evaluation of legal rulings obtained through *ijtihad* and interpretation of text?
3. Discuss some reasons why scholars were concerned with the consequences of certain actions and not just the legality of the actual actions in question
4. How would you distinguish between (a) and (b):
 - a. Those things or actions that are prohibited because they are “instruments” or “means” (*wasā’il*) that lead to particular prohibited ends (*ahdāf*) or objectives (*maqasid*).
 - b. Those ends and purposes (*maqasid*) that are prohibited in and of themselves (*bi dhatihi*).
5. Discuss how some maxims or principles guide scholars in their assessment of consequences when deciding to “block” or “open” the means (*wasā’il*) to certain ends (*maqasid*).
6. List and discuss some of the major and subsidiary maxims that are concerned with the assessment of consequences.
7. What do you think is meant by “opening the means” (*fath al-Dhara’i*); and what other tools of *ijtihad* do you think would perform the same function?
8. How do the consequences of an action affect the judgment of its permissibility/prohibition, if that action is not prohibited by clear textual evidence?

9. Why would those ends that are regarded as neither harmful nor beneficial be considered as simply lawful (*mubah*) and hence treated differently from those where the harm is equal to the benefit?
10. Explain, with examples, why many actions are not so easily described as simply “good” or “bad”? What are the possible reasons that may complicate apparently simple classifications of “right” and “wrong” actions?
11. Why does the existence of harm or evil not automatically imply a prohibition or discouragement?
12. Explain some of the factors or criteria you would consider for assessing the impact and degree of harm or benefit of a particular action, as being greater or less than another.

LESSON 42: NECESSITY AND THE “SAFETY-NET PRINCIPLES”

A well-established legal maxim states that **“With change in circumstances, comes change in *fatwa*.”**⁴⁶⁵ As discussed earlier (in Lesson 19), all jurists understand that justice is not done by the formal application of the law regardless of circumstance - “need” (*hajah*) or “necessity” (*darurah*). The competent jurist therefore assesses a situation and decides whether or not there is a need to make an exception to the law. With knowledge of the purpose and objectives (*maqasid*) of the law, an assessment of the circumstances and the probability of occurrence of the various consequences and “side-effects”, the competent jurist knows whether there is the need to grant a concession or license (*rukhsah*), and hence an exception to the formal application of the law or not.

These exceptional circumstances are usually when the inferential legal instruments (*istidlal*) or **“safety-net principles”** are applied, as their principal role is to protect the objectives (*maqasid*) of the Qur’an and Sunnah i.e. accruing benefits (*maslahah*) and preventing harm (*mafsadah*) or removing hardship (*raf’ al-haraj*) when other tools and principles appear to fail in this regard.

This is also predicated on the juristic conviction that broad standard rules constitute guidelines that must sometimes be qualified, restricted, or suspended under special circumstances to meet the broader purposes for which they were legislated. Each of the 3 reason-based legal instruments – juristic interest/discretion (*istihsan*), “blocking the means”/preclusion (*saddal-dhara’i*), and the unstated good (*al-masalih al-mursalah*) – under certain conditions (depending on the school or scholar), can be used to qualify standard precepts, draw exceptions to them, and make unprecedented additions.

Scholars however, did not regard rulings based on inferential (*istidlal*) “safety-net principles” as having intrinsic permanence like other well-established principles and sources of Islamic law. As earlier discussed, such rulings based on these inferential (*istidlal*) principles, also pertain

⁴⁶⁵Ibn Qayyim al-Jawziyyah, *I’lam al-Muwaqqi’in*, Maktabat Kulliyah al-Azhariyyah, Cairo, 1968, vol. 3. p.47

exclusively to **means** (*wasā'il*), and are legally valid only as long as they continue to secure the **ends** (*maqasid*) for which they were originally legislated.⁴⁶⁶

Jurists would therefore first consider the degree of immediate **“need”** (*hajah*) or **“necessity”** (*darurah*) and the “point of suitability” and “appropriateness” (*munasib*) required, before “safety-net principles” of inference (*istidlal*) – such as the unstated good (*al-masalih al-mursalah*), preclusion (*sadd al-dhara'i*), discretion (*istihsan*), etc. – may be resorted to.⁴⁶⁷

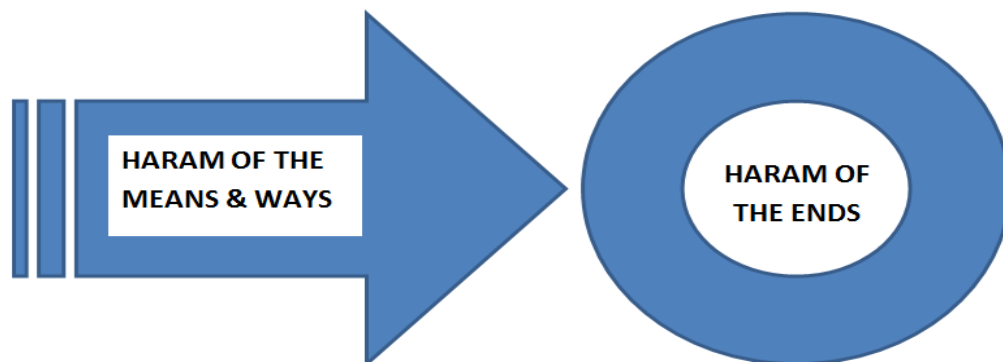
As a general rule, the greater the gravity of the situation and the severity of suffering (*darurah* or *hajah*), the greater the quality and quantity of concessions and leniency (*rukhsah*) given.

Haram of Means and Ends in relation to threatened Daruriyyat and Hajiyyat

For the purpose of removing hardship (*raf' al-haraj*) or giving concessions or allowances (*rukhsah*) under difficult situations, the levels of difficulty are generally ranked into 2 levels of severity or hardship – the “level of *hajah*” where important needs (*hajiyyat*) are threatened, and the more severe “level of *darurah*” where vital necessities (*daruriyyat*) are threatened. Correspondingly, the severity of prohibition (*haram*) also has 2 grades, viz. the level of the “*haram* of the means” and the comparatively more serious “*haram* of the ends”. The latter is more serious than the former because the primary reason for the prohibition of the former is that they lead to prohibited “ends” (*mafsadah*). The greater the level of hardship faced by an individual or community, the greater the level (quality and quantity) of concession given.

⁴⁶⁶ Al-Qarafi, *Al-Dhakhira* (Cairo), 1:143-146; Ibn Rushd, *Bidayat al-Mujtahid*, 1:162 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.178.

⁴⁶⁷ Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.178

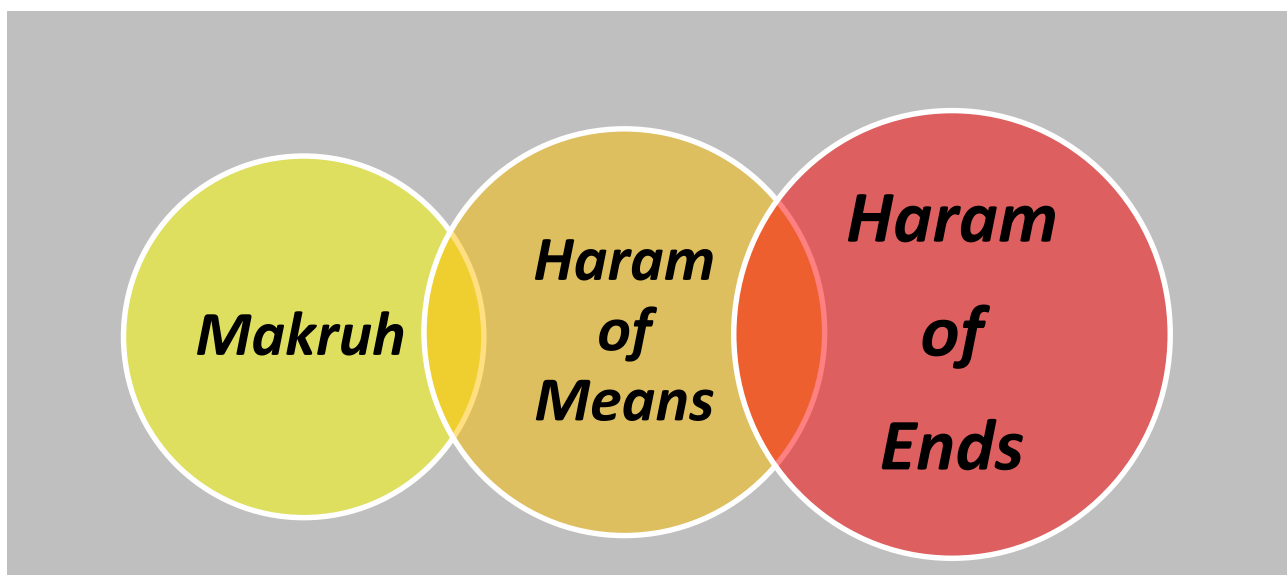


As discussed earlier, some things in *Shari'ah* are prohibited because they are *haram* in and of themselves. These are “*haram* of ends”. Examples may include extramarital sexual relations (*zina*), intoxication, murder, idol worship, rape, gossiping, lying, injustice, etc. Others are prohibited because they are instruments and means (*wasā'il*) that lead to the prohibited ends (*mafsadah*). These are “*haram* of means”. They include uncovering the *ʿawrah*, sitting at a table where alcohol is consumed, keeping large portraits or sculptures of living things, listening to suggestive music, a woman traveling a long distance without an escort, etc.⁴⁶⁸

Scholars would sometimes differ as to whether they regard a particular prohibition as one of the means or as one of the ends because some of the *maqasid* and wisdom behind various obligations and prohibitions are not always obvious or certain.

The diagram below illustrates an overlapping gradation of undesirability from the comparatively less serious/reprehensible though tolerated (*makruh*), to the more serious prohibited “*haram* of the means” (*haram al-wasā'il*) and finally to the most serious and prohibited “*haram* of the ends” (*haram al-maqasid*).

⁴⁶⁸ For a more detailed discussion of the distinction and classifications of “means” and “ends” of *Shari'ah*, see Muhammad al-Tahir Ibn 'Ashur, *Treatise on Maqasid al-Shari'ah*, IIIT London, 2006, p.229-237.



Traditionally, as mentioned earlier (see Lesson 36), the *Maqasid of Shari'ah* are classified into 3 broad and sometimes overlapping hierarchical categories of importance and necessity:



1. THE *DARURIYYAT* (Vital Necessities)

These are life's necessities and the basic needs for survival of individuals. They include those essential requirements for individuals to exist in humane conditions. Traditionally, these are further classified into the protection and preservation of faith (*din*), life (*nafs*), mind (*'aql*), honour/dignity (*'ird*), lineage (*nasal*) or offspring (*nasab*), and wealth (*maal*).

Generally, when one or more of the *daruriyyat* are threatened, a person is described as being in a "state of *darurah*". A "state of necessity" (or *darurah*) is defined by some as a "situation which presents fear of destruction, substantial harm to one of the essential values - faith, life, intellect, property and lineage – involving oneself or another human being. The fear is perceived either with certainty or with a strong probability that destruction or injury will occur, immediately or later, if measures are not taken to prevent it".⁴⁶⁹ So, for example, the essentials of life such as food, water and medication are among the *daruriyyat* ("vital necessities"), while a person who lacks these is described as being in a state of *darurah* ("state of necessity/emergency").

It is the responsibility of every community (especially its leadership) to ensure that it never allows itself to fall into a "state of emergency" or *darurah*. This responsibility is regraded as a "social" or "collective obligation" (*fardu kifaya*) upon representatives of the community and not upon each adult (which would be *fardu 'ayn*). When a person or society is in a state of *darurah*, it is a crisis or emergency situation and collective social obligations (*fardu kifaya*) are treated or regarded as the responsibility of each individual (*fardu 'ayn*) to do whatever they can to prevent total societal breakdown or anarchy.

In such a state of *darurah*, **most things related to the necessity that are usually regarded as prohibitions (*haram*) "of means" and those "of ends" are considered temporarily permissible (*mubah*) or even recommended (*mustahab*) for the duration of the necessity, and there is no sin in committing such *haram* actions if they are forced on one by the**

⁴⁶⁹ Abd Wahab Ibrahim Abu Suleiman, *Fiqh al-Darurah wa Tatbiqatuhu al-Mu'asirah*, Jeddah, Al-Ma'had al-Islami li al-Buhuth wa al-Tadrib, 1414/1993, p.65.

necessity (*darurah*).⁴⁷⁰ Exceptions may be where the harm is as grave as the *darurah* itself, such as murder which would be regarded as always prohibited.⁴⁷¹

Correspondingly, a state of *darurah* (e.g. illness, famine, insecurity or war) could also make an act that is usually compulsory (*fard/wajib*) – such as fasting, implementation of prescribed (*hadd*) punishments or telling the truth - into one that is only recommended (*mustahab*), merely permissible (*mubah*), discouraged (*makruh*) or even prohibited (*haram*).⁴⁷²

The more the number of people affected by the *darurah* the more serious it is. A society in a *darurah* situation is in a “state of emergency”.

2. THE *HAJIYYAT* (Important Needs)

These are important conveniences and needs that are a degree below the *daruriyyat* in terms of importance. They are usually those instruments, structures and institutions which are complementary to and provide essential support for the attainment and maintenance of the *daruriyyat*.

They include education, good healthcare, transportation, security, waste management, commerce, political or administrative and legal systems. Their absence does not immediately threaten life but could reduce the quality of life to such an extent that life becomes unbearable and difficult. A threat to the *hajiyyat* indirectly threatens the

⁴⁷⁰ Allah says: “But if one is compelled by necessity (*darurah*), neither craving (it) nor transgressing, there is no sin on him indeed, Allah is forgiving, merciful.” (Qur’an 2:173). See also the relevant maxims related to concessions (*rukhsah*) discussed earlier (Lesson 41).

⁴⁷¹ In stressing the importance of always choosing the lesser evil, Imam Malik is reported to have once said: “It is permissible to kill one-third of the people in the interest of (saving) the remaining two-thirds.” Al-Zuhaili, *Usul*, 2:758-759 – cited in Wan Azhar Wan Ahmad, *Public Interests (Al-Masalih Al-Mursalah) in Islamic Jurisprudence: An Analysis of the Concept in the Shafi’i School*, ISTAC & IIUM, Kuala Lumpur, Malaysia, 2003, p.47.

⁴⁷² “But if one is compelled by necessity (*darurah*), neither craving (it) nor transgressing, there is no sin on him indeed, Allah is forgiving, merciful.” (Qur’an 2:173). See also the relevant maxims related to facilitation (*taysir*) and concession (*rukhsah*) discussed in Lesson 41. It should be remembered (see Lesson 5) that *Fard/wajib* (sinful by omission) is the opposite of *haram* (sinful by commission), and the principles that regulate verdicts (*fatawah*) for both categories are essentially identical.

daruriyyat. A person who has one or more of their *hajiyyat* threatened is described as being in a state of *hajah*.

When an individual is in a state of *hajah*, those prohibitions that are **“*haram* of means” are temporarily permissible, while “*haram* of ends” remain prohibited**. In addition, jurists consider a “state of *hajah*” as sufficient grounds for **temporarily permitting an action regarding which there is debate or disagreement among scholars about its prohibition** in *Shari’ah*.⁴⁷³ In other words, a person faced with a difficulty of the level of *hajah* should not be held hostage by the legitimate differences of opinions among scholars (*khilaf*). This is partly why some scholars (such as Imam Malik) viewed the diversity of juristic opinions as a mercy (*rahma*) for the community. The diversity was viewed as a justification of realizing the *Shari’ah* objective (*maqasid*) of ease, facilitation and magnanimity (*taysir* and *samahah*).

When a society is in such a state of *hajah*, it is far more serious than when it affects just an individual. Such a society is close to a “state of emergency”, and the state of *hajah* for a community or society is treated as seriously as a *darurah*, which makes most *haram* of means and ends temporarily permissible. If these *hajiyyat* collapse, a society falls into the dire situation of *darurah* or *fitnah*.⁴⁷⁴

Understandably, as with all overlapping categorisations, some *hajiyyat* are more important than others and would therefore, depending on the assessment of the situation, be regarded by a jurist as being among the *daruriyyat*.

3. THE *TAHSINIYYAT* (Luxuries and Embellishments)

⁴⁷³ Abdullah bin Mahfuz bin Bayyah, *Sina’at al-Fatwa waFiqh al-Aqalliyyat*, Dar al-Minhaj, Beirut, 2007, p.193-231; Ibn Qayyim al-Jawziyyah, *I’lam al-Muwaqqi’in ‘an Rabbi al-‘Alamin*, Egypt: Maktabah al-Kulliyyat al-Azhariyyah, 1968, vol.3, p.164; al-Qarafi, *al-Furuq*, vol.2, p.33; Muhammad Abu Zahrah, *Ibn Hanbal: Hayatuhu wa ‘Asruhu, Arauhu wa Fiqhuhu*, Dar al-Fikr al-Arabi, Beirut, p.370.

⁴⁷⁴ Abdullah bin Mahfuz bin Bayyah, *Sina’at al-Fatwa wa Fiqh al-Aqalliyyat*, Dar al-Minhaj, Beirut, 2007, p.193-231.

These are the luxuries, desirables and embellishments of more contented living standards. They are those *maqasid* that make life more comfortable and allow a society to secure its *hajiyyat* and *daruriyyat*.

They are important *maqasid* of Shari'ah because they also allow an individual or society to more readily assist others who are facing greater challenges (of *hajah* or *darurah* situations). *Tahsiniyyat* are also regarded as important objectives (*maqasid*) because the provision or manufacturing of luxury items and services are often major employment opportunities for the less privileged. As a fact, and without encouraging extravagance, the need for entertainment, certain quality of clothing, jewelry, pets, perfume, cosmetics, and art work or design, may be luxury for a wealthy person but these usually also sustains a number of important (*hajiyyat* and even *daruriyyat*) employment opportunities for the poor.

As a general rule, a **threat to the loss of luxury (*tahsiniyyat*) does not justify doing either a “*haram of the means*”, let alone the more serious “*haram of the ends*”.**

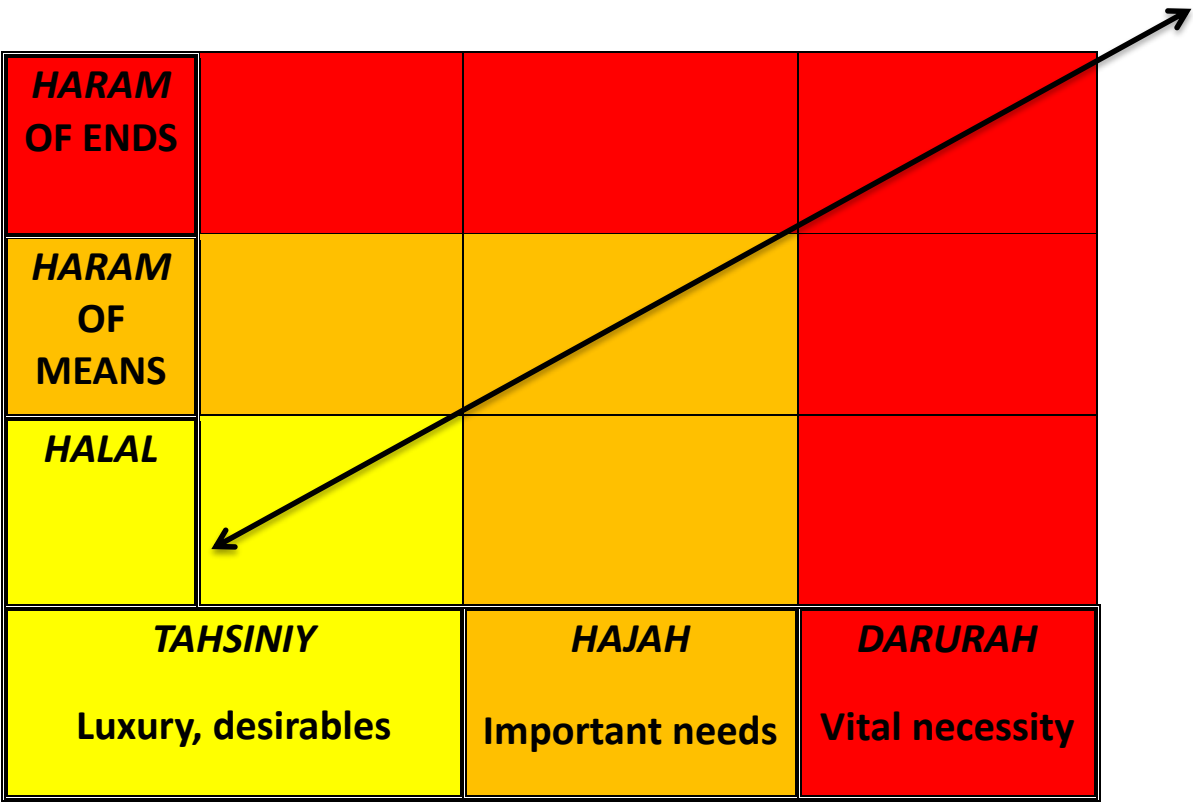
Limitations of the Classification According to Necessity

Some limitations of this classification according to “necessity” – *Daruriyyat*, *Hajiyyat* and *Tahsiniyyat* - are that it does not sufficiently take into account the fact that what may be *tahsiniyyat* for one person, may be more essential (*hajiyyat* or *daruriyyat*) for another. Jewelry (or perfume) may be a luxury (*tahsini*) for the person wearing it, but it may be a source of essential livelihood security (*hajiyyat*) for the person making or selling it.

Also what may be regarded as *hajiyyat* in one society or context may be a *tahsiniyyat* in another. Electricity or a modern waste disposal systems may be viewed as a luxury (*tahsiniyyat*) to people living in a remote rural village, but an life-saving necessity (*daruriyyat*) in an modern urban hospital. Design and art work might be view in one sector (e.g. the cosmetics industry) as a luxury while in another (e.g. the technological, educational or pharmaceutical industry) it is essential for society to reminaing effective, ecomonically viable and competitive.

The traditional classification of *maqasid* according to needs, while still useful, does not sufficiently account for the fact that what may be regarded as *hajiyyat* to an individual (e.g. running water) may actually be *daruriyyat* to a society.⁴⁷⁵

Rukhsah: Licenses through “Opening the Ways” to avoid Hardship and Suffering



The “Concession-Permissibility Gradient”:

- The greater the harm/suffering the more the concession!
- No significant difficulty = No valid excuse = No Concession!

Below is a summary of the major circumstances discussed above when a prohibition (*haram*) may be regarded by jurists as permissible (*halal*):

⁴⁷⁵ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, IIIT, London, 2008, p.246-247.

1. In a state of *darurah* most prohibitions of means and ends are regarded as temporarily permissible (*mubah* or even *mustahab*) for the duration of the necessity, as necessary evils.
2. In a state of *hajah*, those prohibitions that are “*haram* of means” are temporarily permissible, while “*haram* of ends” remain prohibited.
3. In a state of *hajah*, an action about which there is debate or disagreement among scholars regarding its prohibition in *Shari’ah* is temporarily permitted.
4. When a society is in a state of *hajah*, (as opposed to a single individual) it is close to a “state of emergency” and the *hajah* situation is treated as *darurah*, which makes most *haram* of means and ends temporarily permissible.
5. A threat to *tahsiniyyat* does not justify permissibility for either “*haram* of the means” let alone a “*haram* of the ends”.

It needs to be clearly stated that **it is only those *haram* of means/ends which would alleviate the *darurah/hajah* situation that would be permissible** under the various situations mentioned above, not just any *haram* - “Necessity is measured in accordance with its true proportions” (*Ad-daruratu tuqaddaru bi-qadriha*). Allah says “*But if one is compelled by necessity (darurah), neither craving (it) nor transgressing, there is no sin on him indeed, Allah is forgiving, merciful.*”

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As stated earlier, **the greater the gravity of the situation and the severity of suffering (*darurah* or *hajah*), the greater the quality and quantity of concessions and leniency (*rukhsah*) given.** If there is no hardship that is out of the ordinary acceptable difficulties of normal life, the verdict (*fatwa*) on an issue will remain the same as the normative judgement on a thing (*hukum*) as it is assumed to be a situation of sufficient comfort (*tahsini*) that does not deserve any concessions or licenses (*rukhas*⁴⁷⁷).

The lifting of *haram* during certain states of need or necessity is a form of “opening the ways” to benefit (*fath al- dhara’i*) and granting of a concession or license (*rukhsah*). These tools, as evident above, are regulated not so much by textual certainty but by certainty of attaining the *Maqasid*. As mentioned earlier, *fath al- dhara’i* operates in a similar way as *Istihsan* which is “putting aside the necessary consequences of a legal directive by way of making an exception to

⁴⁷⁶ Qur’an 2:173

⁴⁷⁷ Plural of *rukhsah*

it through granting a special license (*tarakhkhus*) because of the contradicting (*mu'arada*) of special circumstances.”⁴⁷⁸

The need for caution regarding declarations of *haram* or *fard/wajib*

Maqasid-based assessments of means and ends may lead an individual towards the inclination of declaring a thing *haram*. However, because of its serious implications for *shirk*, it is crucial to exercise caution in deductions of *haram*.

The existence of disadvantages does not automatically mean a thing is *haram*. Divorce, coffee, polygamy, etc. have disadvantages but are not automatically prohibited. The existence of advantages does not mean a thing is automatically entitled a *rukhsa* either. One of the maxims (quoted earlier) states that, “Necessity is measured in accordance with its true proportions” (*Ad-daruratu tuqaddaru bi-qadriha*). It is important to have clear **strong textual evidence or well-established evidence that an accepted objective (*maqsid*) of *Shari'ah* is being threatened** before taking such actions.

In addition, the fact that an action could lead to *haram* does not automatically mean it is *haram* – mixed gatherings, going to the market, showing nakedness to a doctor, etc. are unlikely to lead to *haram* unless additional factors are present that increase the risk of harm. Conversely, not attending gatherings, not going to the market and not revealing oneself to a doctor may also present a risk of harm. It is, therefore, important to “**assess the risk**” of an action as well as its inaction, and any alternative actions towards the same purpose.

Another consideration is that something may be prohibited by law (*qanun*) if the harm is probable, **significant** and **greater than the benefit**, upon having done an **impact assessment**, but might still not be regarded as *haram* in the sense of being sinful. For example, a state may decide to ban polygyny for all men who are supported by the state treasury/social security (*Bayt al-maal*) in order to minimise the use of marriage as a means for increased state dependency. However, the act of polygyny under such circumstances may still not be *haram* in the sense of being sinful.

⁴⁷⁸ Al-Shatibi, *I'tisam*, 2:320-321 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.162-163.

When the Letter and Spirit Clash

It is important to appreciate the role of *Usul al-Fiqh* in reducing apparent conflict between pieces of evidence within the Qur'an and Sunnah. However *Usul al-Fiqh* has never been the final arbiter in Islamic Jurisprudence.⁴⁷⁹

It is also important to appreciate the role of the *Maqasid* (being an articulation of the spirit of *Shari'ah*) in guiding the process and conclusion of *Usul al-Fiqh* and further reducing apparent conflict. The strength of *Maqasid al-Shari'ah* in playing this role is associated with the fact that it enjoys much greater consensus among all the Schools of Juristic Thought and even between various faiths and ideologies.

The letter and the spirit of the law should, therefore, go hand-in-hand. Where there is an apparent irreconcilable difference, the *maqasid* of unity and brotherhood, respect and consideration, compassion and magnanimity should always prevail over verdicts that entrench derision and division.

This idea may be illustrated in the case cited earlier of the Companions going to Banu Qurayzah.⁴⁸⁰ As discussed, the Prophet (ﷺ) accepted as valid both the interpretation of the letter and that of the spirit of the law, since no harm was caused by either one. It is also worth mentioning that the higher *maqasid* of unity, social cohesion and brotherhood was respected by the Companions concerned even though the issue centered on an act of *ibadah*, and in spite of their different inclinations towards the letter or the spirit and purpose of the text. This shows the “width of the Straight Path”, and the importance of respecting both approaches to the interpretation of texts.

Various tools of *ijtihad* (such as *qiyas*, *istihsan* and *istislah/maslahah*, *urf*, etc.) are used by jurists when the letter of the law does not adequately resolve an issue (without undermining some or any of the *maqasid* of *Shari'ah*). Competent jurists would ensure that a *fatwa* does not facilitate a greater harm and that *mafsada* is avoided.

The concern for justice, equity and fairness, and a sense of responsibility for the attainment of the objectives (*maqasid*) of the laws (of the Qur'an and Sunnah) through systematic analyses,

⁴⁷⁹ Muhammad al-Tahir Ibn 'Ashur, *Treatise on Maqasid al-Shari'ah*, IIIT London, 2006, p.xvii.

⁴⁸⁰ Al-Bukhari, no. 3893; Muslim, no. 4701.

appears to be the main preoccupation of those scholars who have delved deeper into this subject area (of *istidlal*). They also appear to be more concerned with loyalty to “why” things were done the way they were by the earliest generations (*salaf*) of Muslims. They appear to be more concerned with preserving the purpose and spirit of the law than its form when faced with changing contexts. The purpose of law is to attain the objectives (*maqasid*) of the Divine Will. Consequently, a maxim in *Al-Qawai’d al-Fiqhiyyah* that relates to leadership and public policy states that, “The affairs of the *imam* concerning his people are judged by reference to *maslahah*” (*Amr al-Imami fi shu’unar-ra’iyyati manutun bil-maslahah*).⁴⁸¹

Those who object to the reason-based instruments of *istidlal* or who put greater restrictions on their use appear to be more concerned with humility before the literal texts of the Qur’an and Sunnah, and the concern for loyalty to “what” or “how” things were done during the earliest generations of Muslims. They appear to be more concerned with preserving the form and letter of the law than its purpose when faced with changing contexts. The ultimate purpose of law is to test submission to the Divine Will. However, even the most literalist of scholars holding this perspective recognized the need to relax certain laws under specific circumstances of need or necessity based on the clear Qu’anic verse: “*But if one is compelled by necessity (darurah), neither craving (it) nor transgressing, there is no sin on him indeed, Allah is forgiving, merciful.*” (Qur’an 2:173).

The challenge of the lay person or average Muslim is to appreciate both legitimate (and balancing) concerns – for the letter and the purpose. In reality, each scholar and school often represents a particular paradigm that is more or less biased to each of these concerns for the letter or spirit of the law on each “controversial” issue or debate. The difference is usually in how much to the right or left of this spectrum a scholar is inclined or willing to venture, their qualifications to do so, and their sense of responsibility to the community and Creator. None of them is at the absolute extreme of the spectrum if they are indeed *Mujtahids* – involved in *ijtihad*! ...and Allah knows best!

⁴⁸¹ Mohammad Hashim Kamali, *Qawai’d al-Fiqhiyyah: The Legal Maxims of Islam*, UK, The Association of Muslim Lawyer, 1998, p.1.

Smart Trust vs. Blind Faith

The reason why as Muslims we follow the Qur'an and *Sunnah* is because we are rationally convinced and sure that they are ultimately from Allah and His Messenger (respectively), and because we trust (i.e. have *iman*) in His guidance. This is similar in some ways to the trust or faith we have in a surgeon once we are certain of his or her qualifications.

This stresses the importance of convincingly establishing the authenticity of the Qur'an and *Sunnah*, and of understanding the correct rules of interpreting them.

Once we are certain of the authenticity and meaning of the text of the Qur'an and *Sunnah*, it is most rational to trust, have faith and comply with the guidance and Wisdom of Allah through His Prophet (ﷺ) which is ultimately there to protect us from harm (*mafsada*) and accrue benefit for us in this life and in the Hereafter.

DISCUSSION QUESTIONS:

1. Distinguish between the ends (*maqasid*) that are *daruriyyat*, *hajiyyat* and *tahsiniyyat*. How these are related to facilitation, concession or the “opening of means”?
2. Discuss with 2 examples, why the “severity” of harm is a necessary but insufficient factor for prohibition?
3. Discuss with 2 examples why the risk of occurrence or probability of harm or suffering is necessary but not sufficient reason for prohibition?
4. How does the assessment of risk/probability assist scholars in ascertaining/attaining the level of certainty needed to declare a thing as *fard/haram* when considering consequence?
5. Why is it important to also consider the benefits of an action, when assessing how bad it is and how probable its occurrence is?
6. Discuss 4 levels of probability associated with the occurrence of suffering or harm, and the differing judgments scholars would associate with each level of the risk.

7. In view of the need for assessing the risk, severity, side-effect, consequences, etc. of certain actions and innovations in any contemporary context, what qualifications would you consider relevant in the formulation of a *fatwa* council in your country/community?
8. What institutions exist in modern secular societies which could fulfill some of the roles of *fatwa* councils to prohibit harm or facilitate benefits in various fields or sectors?
9. List 10 examples of things or actions that might be regarded as “*haram* of the means”.
10. List 5 examples of things or actions that might be regarded as “*haram* of the ends”.
11. Do you think there could be a correlation or relationship between “major sins” and “*haram* of the ends”, or between “minor sins” and “*haram* of the means”?
12. Why do you think some scholars are of the opinion that “safety-net” tools such as *maslaha*, *istihsan*, etc. can only, under certain circumstances, change “*haram* of the means” and not the more permanent “*haram* of the ends”?
13. Why do you think some scholars would sometimes disagree in their classification of those things that are *haram* of the ends (*maqasid*) and those that are *haram* of the means or way (*wasail*)?
14. What criteria would you consider useful in distinguishing between *haram* of the means (*wasail*) and *haram* of the ends and purposes (*maqasid*) bearing in mind the earlier discussion on the “levels of why”?
15. In what sense is it correct to say that concern for consequences can only result in a *fatwa* but cannot establish a *hukum*?
16. What is the difference between the “*daruriyyah*” in the *maqasid* of *shari’ah* and a state of “*darurah*”?
17. What class of *haram* (ends or means) usually become permissible when a *daruriyyat* is threatened?
18. What is the difference between the “*hajiyyat*” in the *maqasid* of *shari’ah* and a state of “*hajah*”?
19. When could a state of “*hajah*” make permissible that which was otherwise usually prohibited (List at least 3 situations) for an individual or community?

20. Give reasons why you think the *tahsiniyyat* (luxuries, desirables and embellishments) are regarded as being among the objectives (*maqasid*) of *Shari'ah*. How of they of benefit to society when they also open the doors to extravagance?
21. Under what circumstances could a *tahsini* (embellishment) justify a license (*rukhsah*) for a *haram* to be made permissible by a scholar?
22. What would you regard as some of the limitations of the traditional classification of the *maqasid* into 3 – *daruriyyat*, *hajiyyat* and *tahsiniyyat*?
23. Under what circumstances would certain “*haram* of the ends” (*maqasid*) be permissible? (List at least 3)
24. Under what circumstances would a “*haram* of the means” (*wasail*) be permissible? (List at least 4.)
25. Why would scholars not prohibit any action that could lead to a prohibition?
26. Give some examples of existing legal offenses that are based purely on *Masalih al-mursalah* (textually unstated public interests) even if not done through the procedures of *ijtihad*.
27. Why could the field of “*Maqasid al-Shari'ah*” play a more important role than “*Usul al-Fiqh*” in reducing differences of opinions that emanate from apparently conflicting proofs or evidence (*adillah*)?
28. What specific *maqasid* would you recommend that are based on explicitly clear (*qat'i*) texts, which should play a more significant role in creating greater cooperation and unity within the *ummah*/community in spite of differences over interpretations of texts?
29. Using the case of the companions who differed over praying 'Asr prayer before reaching the settlement of Banu Qurayzah, explain how the greater *maqasid* prevented the companions from disunity over an important '*ibadah* such as *salat*.
30. Using the metaphor of a medical doctor distinguish between faith based on evidence or smart trust, and unquestioning “blind faith” or uncritical trust.
31. Arrange the following steps for searching for a wise decision in their correct order:
 - a) Analyse the information available
 - b) Be passionate and committed to action
 - c) Gather all relevant information

- d) Stay open to periodic re-assessment of decisions
 - e) Decide and conclude on the wisest outcome
32. Why should a scholar and community stakeholder be motivated to take decisions and give religious verdicts when they risk “speaking in God’s name” and committing the sin of *shirk*?

LESSON 43: RECONCILING DIFFERENT OPINIONS

Scholars, experts and specialists in every field of human endeavour differ and correct each other on some issues in their respective fields. Knowledge of/in one discipline is always related to knowledge of/in other disciplines. This inter-disciplinary nature of knowledge makes it difficult for anyone to know everything related to their discipline. There will always be certain things that are simply assumed or just taken for granted. Scholars therefore differ based on the ‘rational’ assumptions they make and certain things they take for granted. It is difficult to know what you don’t know, or to know what you take for granted simply because it is taken for granted! This is a natural human deficiency and only Allah is All-Knowing.

Another reason why ‘knowledgeable people’ or scholars would dissenting views on an issue is related to the differences in their analytical tools and research methodologies. Scholars are also human and therefore liable to err and make mistakes⁴⁸² - Mistakes they make when using the tools, mistakes in how well they use the tools, or just different choices regarding what tools to use for a particular case.

Scholars and their Specializations

When scholars in any field differ on any particular issue, it is also important to know their specializations and who among them may be the most competent and qualified to be an

⁴⁸² A specialist or expert is often one who knows a lot about a little; and progressively learns more and more about less and less!

authority on the issue at hand.⁴⁸³ Just because a person is called a “*Sheikh*”, “*Imam*”, “*Ustaz*”, “*Professor*” or “*Dr.*” (Ph.D) does not necessarily mean they are an expert in that field or a particular topic. Moreover, even specialists are not infallible!

Traditionally, there were certain scholars who were well-known to be the authorities in their fields and they usually restricted themselves to giving opinions in their respective specializations. They were often wise and humble enough to not give verdicts about other specializations unless they had come to master these. As with other fields of human endeavor, a few scholars did specialize in more than one of the inter-related disciplines of the Islamic Sciences.

Mujtahids, Muftis and Fuqaha

The scholars who specialized in *Usul al-Fiqh* or the Foundations of Islamic Jurisprudence and the methodology of *ijtihad* were known as the “*Usuli*” scholars or “*Usuliyyun*”. The most qualified of these became jurists qualified to do *ijtihad* in one or more fields. These were called “***Mujtahid***” scholars or “*Mujtahidun*”. This was the highest qualification in Islamic jurisprudence and the only person regarded as qualified to come up with new Islamic verdicts to changing circumstances or challenges. The role of the *Mujtahid* is similar to an Industrial Pharmacist who concocts new or better medicines for both newly discovered and old illnesses.

The qualifications of a *Mujtahid* include: “(a) mastery of the Arabic language, to minimise the possibility of misinterpreting Revelation on purely linguistic grounds; (b) a profound knowledge of the Qur’an and *Sunnah* and the circumstances surrounding the revelation of each verse and hadith, together with a full knowledge of the Koranic and hadith commentaries, and a control of all the interpretive techniques...; (c) knowledge of the specialised disciplines of hadith, such as the assessment of narrators and of the *matn* [content]; (d) knowledge of the views of the Companions, Followers and the great *Imams*, and of the positions and reasoning expounded in the textbooks of *fiqh*, combined with the knowledge of cases where a consensus (*ijma’*) has been

⁴⁸³ For a fuller picture of scholars’ position on respecting specialisation, see Gibril Fouad Haddad, *The Four Imams and their Schools*, Muslim Academic Trust, London, UK., p. 198, where Imam al-Shafi’i is quoted as saying, “*You (scholars of hadith) are the pharmacists but we [the Jurists] are the physicians.*” Mulla ‘Ali al-Qari also said, “*The early scholars said that the hadith scholar without knowledge of fiqh is like a seller of drugs who is no physician: he has them but he does not know what to do with them; and the fiqh scholar without knowledge of hadith is like a physician without drugs; he knows what constitutes remedy, but does not have it available.*” Imam al-Ghazali in *al-Mustasfa* and Imam ibn Qudama in *Rawdat an-Nazir* too said that, “*a ‘Alim may be an Imam in a particular science and an uneducated common person in another.*”

reached; (e) knowledge of the science of juridical analogy (*qiyas*), its types and conditions; (f) knowledge of one's own society and of the public interest (*maslahah*); (g) knowing the general objectives (*maqasid*) of the *Shari'ah*; (h) a high degree of intelligence and personal piety, combined with the Islamic virtues of compassion, courtesy, and modesty."⁴⁸⁴

In the absence of an individual with all of the above qualifications, some Muslim communities and nations have established bodies or councils of scholars who collectively possess these qualities. Examples include the Research Council of Al-Azhar, the Islamic Fiqh Council of the Organisation of Islamic Conference, the Fiqh Council of North America, and the European Council for Fatwa and Research.

A **Mufti** is a scholar qualified to give a religious answer or verdict (*fatwa*) in response to a specific question or issue in a particular context. He or she is like a medical doctor who practices in a specific environment. He or she could diagnose the problem, its causes and the situation or context in which the prescription or solution (*fatwa*) is to be applied, and then decide the dosage (of the prescription developed by the *Mujtahidun*) is the most appropriate and in line with the higher objectives (*maqasid*) of *Shari'ah* for that context.

Because a *Mujtahid* is also knowledgeable enough about the context of his or her society, a *Mujtahid* is usually also qualified to be a *Mufti*. Hence, the two terms are often used interchangeably. The *Mujtahid* and *Mufti* are both *Usuliyyun*, but differ in their scope of application. The *Mufti* and *Mujtahid* are both in the business of giving *fatwas* to new issues – the *Mufti* does so by prescribing from existing verdicts, while the *Mujtahid* does so by developing new verdicts.

The **Faqih** (plural, *Fuqaha*) is an expert in fiqh and in existing juristic opinions. The term is therefore also used to describe the *Usuliyyun* since their subject of specialization is also jurisprudence or law, though at the deeper level of the principles and fundamentals (*usul*). The *Faqih* is usually knowledgeable in the conclusions of some of the *Mujtahids* – often those of his own school of Juristic Thought (*madhhab*). In other words, he or she is more like a clinical pharmacist who knows some of the medicines that have been developed and what they are for, but cannot diagnose patients (as a *Mufti* could), nor develop or concoct new medication (as a *Mujtahid* could).

⁴⁸⁴Abdal Hakim Murad, *Understanding the Four Madhhabs*, Cambridge: Muslim Academic Trust, 1999, pp.9-10.

Mufassirun and Muhaddithun

The **Mufassir** (plural, *Mufassirun*) is a scholar who specialises in the sciences of understanding and interpreting the meaning of the Qur'an (*Ulum al-Qur'an*). *Mufassirun* are the experts in the exegeses of the Qur'an. They do not give *fatwas* (religious verdicts) as this requires knowledge of society, other fields (such as *Usul al-fiqh*, etc.) and the tools of *ijtihad* that are usually not in their field of expertise. However, *Mufassirun* provide the most important “raw material” in the formulation of “medicines” or *fatwas* by the *Mujtahidun* on an issue i.e. the opinion of Allah, the Lawgiver.

The **Muhaddith** (plural, *Muhaddithun*) is a scholar who specialises in the Sciences of Hadith (*Ulum al-Hadith*). *Muhaddithun* are also the Hadith authenticators and commentators. They are concerned with determining and ranking the authenticity of hadith based on various criteria (discussed earlier), and on expounding the meaning and context of the hadith. Just like the *Mufassirun*, they do not give *fatwas* (religious verdicts) as this requires knowledge of other fields and the tools of *ijtihad* (such as *qiyas*, *ijma'*, *maslahah*, *istihsan*, *'urf*, etc.) that were not in their field of specialization. They provide the second most important “raw material” in the formulation of “medicines” or *fatwas* by the *Mujtahidun* i.e. the authenticated hadith regarding the tradition (*sunnah*) of the Prophet (ﷺ) and his Companions.

Traditionally, scholars were either *Mujtahids* and therefore capable of independent *ijtihad* (independent, juristic reasoning) or they were *Muqallids* and only required to respectfully trust and follow the opinions of the *Mujtahids*. In other words, all *Mufassirun*, *Muhaddithun* and others who did not reach the qualification of a *Mujtahid*, belonged to a school of juristic thought of a *Mujtahid* and the opinions of the *Mujtahids* of a school became what all other scholars in that school endorsed.

A useful analogy is this: The fact that an individual supplies or procures raw materials for the manufacturing of medicine does not qualify him/her as an industrial pharmacist or a doctor. Therefore, that individual is bound to respectfully follow the opinions of the industrial pharmacist or the doctor. This is the most truthful and rational position for a non-*Mujtahid* or non-*Mufti* in spite of that person's excellence within his or her own specialization.

DISCUSSION QUESTIONS:

1. Discuss some of the more common reasons why there are many conflicting opinions among Muslim scholars today?
2. Explain, with examples, ways in which differences of opinions among scholars have been a blessing to the *ummah*.
3. Explain, with examples, ways in which differences of opinions among scholars have been a major challenge.
4. Explain how and why differences of opinion could be viewed as “unity in diversity” or “diversity within unity.”
5. Why should differences of opinion exist among experts and even specialist scholars?
6. Is knowledge key to unity among Muslims or do we have less knowledgeable Muslims that have shown greater unity within the *Ummah*?
7. What is the importance and role of specialist scholars in reducing differences of opinion among Muslims? How can their potential be tapped?
8. In what ways could specialist scholars contribute to misconceptions about Islam and disunity within the *Ummah*?
9. Discuss the similarities and differences between the following specialists – *Usuli*, *Mujtahid*, *Mufti* and *Faqih*.
10. What are some of the most important qualifications required for any individual, group or organization to play the role of *Mujtahid*?
11. Discuss the similarities and differences between the *Fuqaha*, *Mufasssirun* and *Muhaddithun*.

What to do When Scholars Differ⁴⁸⁵

When one encounters differing opinions expressed by respected scholars it is important to consider the reasons for the differences, and to respect the differences even if one prefers a particular opinion. When doctors differ in their prescriptions and recommendations, it is not for the patient to insult the doctor or try to spoil the reputation of a doctor, but to respectfully decide on which one to go with since the patient, being unqualified in the field of medicine, may not be in a position to judge the opinion of either doctor. What the patient should avoid is self-medication or, even worse, to start prescribing medicines for others and declaring various doctors as unqualified, especially when he or she does not have any qualifications in medicine.

Public health practitioners, dentists and pharmacists also have to be very careful and respectful if they decide not to go with the opinion of a doctor, even though they may all be in the field of healthcare.

When doctors differ with doctors, they respectfully agree to disagree agreeably with each other. When students differ with doctors, humility, curiosity and sincerity become among the most rational virtues to exhibit.

It should be very clearly understood that the fact that scholars could differ on an issue usually implies that the evidence from the text of the Qur'an and *Sunnah* is not explicitly clear or certain within the context of the issue or question at hand. If the text were clear and authentic on an issue, there would be no basis for a difference of opinion or a need for *ijtihad* in the first place. The existence of differences among scholars should, therefore, first evoke curiosity, humility and sincerity.

There are different levels of "lay people" and different levels of "students" and "scholars". Sometimes, however, a decision still has to be taken when scholars differ or when doctors differ on the diagnosis or prescription for a particular "illness".

There are many factors to consider, and about ten possible courses of action could be taken. Some of these factors may stand alone in helping a person decide what opinion to follow. Often, a number of these factors are combined together to arrive at a decision that may be more

⁴⁸⁵ See one of the best books in English on this subject, Taha Jabir Al-Alwani, *Ethics of Disagreement in Islam*, The International Institute of Islamic Thought, Herndon, Virginia, USA, 1993.

reasonable and gives more peace of mind. Furthermore, what may suit one person or community in their situation may not be the best for another, and only Allah knows best.

1. Go with the “strongest” opinion

One course of action to take when scholars differ is to go with “the strongest opinion” based on careful assessment of the evidence available, and on the proper application of the tools of *usul al-fiqh* and the *maqasid* of *Shari’ah*. This is often referred to as *Tarjih*.⁴⁸⁶ This option is regarded as the best as it entails investigation and evaluation of the process of *ijtihad* used by scholars, and the relevance of their opinions to the context in question. However, it is the best option for only a person who is qualified to carry out such investigation,⁴⁸⁷ i.e. a person who possesses a significant level of proficiency in the use of the tools and methodology of a particular scholar or school of juristic thought. In fact, a *Mujtahid* or person (or group) qualified to perform independent *ijtihad*, is required to avoid following the opinions of other *Mujtahids* blindly but to go with what they believe from their analyses to be the truth on an issue.

2. Go with the opinion best supported by the objectives (*maqasid*) of *Shari’ah*

It is often easier to know if a *fatwa* clashes with any of the established *maqasid* of *Shari’ah*, than it is to assess the proficiency with which the tools of *usul al-fiqh* were used in a particular situation. For leaders, the concern for what is in the best interest of the public (*maslahah*) and the higher objectives (*maqasid*) of *Shari’ah* is paramount. *Maslahah* (or *maqasid*) becomes the “compass” with which to decide what opinion should be accepted in a particular context. The juristic opinion that is based on the use of the tools of *Usul al-Fiqh* and which is also most in line with the *maqasid* of *Shari’ah* would therefore be regarded as the most relevant and appropriate for a leader to go with. In other words, it may be asked, “Which *fatwa* has the most problem-solving potential? – the greater good or lesser evil – under the circumstances?” This requires a comparative assessment of the various *fatwas*, and a decision based on its utilitarian value to the community.

⁴⁸⁶ Al-Shawkani, *Adab al-Talab*, p.43, cited in Muhammad Imam, *Al-Ibanah an Kayfiyyat al-Ta’amulma’a al-Khilaf Bayna Ahl al-Sunnah wa al-Jama’a*, Dar al-Athar, Yemen, 1431H, p.104

⁴⁸⁷ Allah also praises “those who listen to others and goes with the best opinion” (Qur’an 39:18)

A well-established maxim (in *Qawa'id al-Fiqhiyyah*) that relates to leadership and public policy states that, “The affairs of the imam concerning his people are judged by reference to *maslahah*” (*Amr al-Imami fi shu'unar-ra'iiyyati manutun bi al-maslahah*).⁴⁸⁸ This “public benefit” or “common good” (*maslahah*) was sometimes achieved by resorting to combining or choosing from various scholarly opinions and Schools of Juristic Thought and deciding upon the most relevant to *maslahah*.⁴⁸⁹ The practice is referred to as *Talfiq*, and is justified if it is in acts of *ibadah*, or in the enhancement or protection of a *maqasid* of *Shari'ah* in *mu'amalat*.⁴⁹⁰

When some scholars could not find an existing opinion that met the criteria of the usual tools of *usul al-fiqh*, they would resort to the use of *istihsan* (or juristic preference) which is usually a purely *maqasid*-based tool of *ijtihad* used in the Hanafi and Maliki schools in particular, and some of the later scholars of the Shafi'i and Hanbali Schools.⁴⁹¹

The maxim, “Actions are judged by the intentions behind them” (*Al-umuru bi-maqasidiha*) is applied by some scholars to religious verdicts (*fatwas*). In other words, even a *fatwa* is judged by the purpose (*maqsid*) it achieves. The closer it is to achieving the *maqasid*, the more credible it is.

Madhhabs traditionally benefitted from each other's analysis and conclusions, and most of them held more than one opinion on some issues, some of which coincided with the position of other Schools. **Ibn Abidin**, for example, advised fellow Hanafi scholars to search in the Maliki *madhhab* if they did not find an appropriate answer in their *madhhab*. Today, nearly all reputable *madhhab* scholars everywhere follow the Hanafi School in matters related to Islamic finance and on some issues of jurisprudence related to Muslim minorities (*Fiqh al-aqalliyyat*).⁴⁹²

⁴⁸⁸ Mohammad Hashim Kamali, *Qawa'id al-Fiqhiyyah: The Legal Maxims of Islam*, UK, The Association of Muslim Lawyers, 1998, p.1.

⁴⁸⁹ This is easily visible in many past and present *fatwas* related to the Hajj (pilgrimage) as a result of concern for the dangers of excessive congestion due to the high population concentrations. This is also visible in many of the *fatwas* by jurists related to the challenges faced by Muslim minorities.

⁴⁹⁰ USA. Shaykh Abdullah ibn Bayyah, *The Legal Philosophy of Islam* (13 audio CDs), trans. from Arabic by Hamza Yusuf, Alhambra Publications, California, USA, 2000.

⁴⁹¹ See discussion on *Istihsan* presented earlier.

⁴⁹² Shaykh Abdullah bin Bayyah, *Sacred Law in Secular Lands* (Vol.1 and 2, 18 audio CDs), trans. from Arabic by Hamza Yusuf (California, USA: Alhambra Productions, 2000).

3. Follow your *madhhab* and stick to it⁴⁹³

For a person who has to rely on the opinion of others (*Muqallid*), which was anyone other than a *Mujtahid* (or *Mufti*), the only option was for them to follow an existing school of juristic thought or a *Mujtahid*. This is because the “gates of *ijtihad*” are closed for those not qualified enough to open them.

It is also feared that allowing people to freely pick and choose from any school of juristic thought could lead to concocted opinions or conclusions that do not go in line with the analysis or methodology of any *Mujtahid*. This approach could as well create loop-holes that could be used as legal stratagems and tricks (*hiyal*), whereby the *maqasid* of *Shariah* are abused using “legally acceptable” means that do not contradict the literal text of the Qur’an and *Sunnah* or *Ijma’*.

Another reason why some scholars insist on people sticking to their particular school of juristic thought, and especially the predominant one in a region, was for the more practical purposes of law, and the fact that most Islamic courts operated with the *madhhab* of the land. If people were allowed to pick positions from any *madhhab*, it could create difficulties on specific issues for judges who might be acquainted with only their *madhhab*.

Also, scholars of a particular region generally belonged to one *madhhab*. If someone had difficulties on an issue, it would make things easier for all – reduce arguments too - if the scholars who are asked a question were conversant with the *madhhab* as the one asking.

4. Follow the *Ijma’* (consensus) or *Jamhur* (majority) of scholars

Following the *ijma’* usually means following the majority of scholars of a *Madhhab* or of all scholars of all *madhhabs*. Following “consensus” or the majority is usually justified by the same evidence used to justify *ijma’* - The Prophet (ﷺ) is reported to have said, “Allah’s Hand is with the majority” and, “My Ummah will not agree on error. If you find differing

⁴⁹³ See: Ahmad bin Muhammad al-Sawi, *Hashiyah al-Sawi ‘ala Tafsir al-Jalalain* in his commentary on Q 18:23-24; Muhammad ibn Muhammad ibn Ahmad al-Maliki Al-Shinqiti, *Irshad al-Muqallideen ‘Inda Ikhtilaf al-Mujtahideen*, Dar Ibn Hazm, Beirut, 1997, p.52.

opinions, follow the majority”⁴⁹⁴. It is reported from the Companion (i.e. not hadith), Abdullah bin Mas’ud that “What Muslims regard as good is good in the view of Allah”. Logically, “there is safety in numbers”. Where the majority of scholars or experts in any field hold a particular position, it is more probable that they are correct. This approach is often supported with the following verse:

“And whoever contradicts and opposes the messenger (Muhammad (ﷺ)) after the right path has been shown clearly to him and follows other than the believers’ way, We shall keep him in the path that he has chosen, and burn in hell- What an evil destination.” (Qur’an 4:115)

5. Follow the opinion of your Local scholar(s)

This is a very practical approach. According to **Ibn Abidin**, most of the religious verdicts (*fatwa*) given by scholars are determined or influenced by the local custom (*‘urf*) or the time and place that the scholar is surrounded by.⁴⁹⁵ This naturally makes the relevance and appropriateness of *fatwas* very much dependent on the social context and priorities of the society in which the question is raised.⁴⁹⁶

Considering the local context and custom is so important to the attainment of the objectives (*maqasid*) of *Shari’ah* that they are among the necessary tools of *Ijtihad*, as discussed earlier. Since a *Mujtahid* or *Mufti* cannot reach a correct prescription without sufficient diagnosis of the social context or culture in which the prescription will be applied, it follows therefore that many prescriptions given by qualified scholars in their own context may not apply in

⁴⁹⁴ Hadith scholars differ on their assessment of this hadith. Some regard the beginning of the hadith as strong, while other considering the ending of it to be “very weak”. See Nasir al-deen al-Albani, *Sahih al-Jami’u al-Saghir*, hadith no.1848; *Silsilat al-Hadith al-Da’ifah*, hadith no.2896; Sunan Ibn Majah, Dar al-Fikr, Beirut, hadith no.3950, vol.2, p.1302.

⁴⁹⁵ Sheikh Ali Gomaa, *Responding from the Tradition*, Fons Vitae, 2011, p. 22; See ‘Umar Faruq Abd-Allah, *Islam and the Cultural Imperative*, A Nawawi Foundation Paper, 2004, p.4-6 and The Dawah Institute of Nigeria’s booklet: *What is “Islamic” Culture? Islam and Cultural Diversity*, Islamic Education Trust, Minna, 2010.

⁴⁹⁶ Scholars, such as Imam Malik, are reported to not like answering questions related to *mu’amalat* from distant lands, and would often ask the questioner to “ask your own scholars”. See similar views by An-Nawawi, Al-Khatib al-Baghdadi, Ibn Qayyim, Al-Albani, Ibn Uthaimin, and others regarding the importance of knowledge of the local context and *‘Urf* before a mufti delivers any *fatwa* in Sa’ad bin Abdullah al-Bariq, *Fatawa al-Fadhdiyyat*, Rabita al-Alam al-Islamiy, Jeddah, p.40-43.

every society. It is therefore not fair to attribute to every situation the “opinion of a Scholar” who himself might not have been even aware of the present context. This would amount to quoting the scholar out of his own context, especially when the issue is related to *mu’amalat* or social transactions. Since most *fiqh* and *fatwas* are products of a good understanding of the environment and context of the respective scholars, most *fiqh* is *Fiqh al-waqi’* (i.e., “contextual” or “Situational *Fiqh*”).

Logically, it would be difficult for a judge’s verdict or doctor’s prescription to be appropriate or relevant to a person who lives in an unknown society or environment. The need for justice or equity calls for a good grasp of the context and situational dynamics of the society.

6. Follow the most Culturally Appropriate Opinion

Sometimes scholars differ in their assessment of their own contexts. In such situations, some scholars suggest that the best is to go with the most culturally appropriate opinion.

One of the 5 most respected legal maxims of *Shari’ah* states that, “Cultural usage shall have the weight of law” (*al-’ada muhakkama*). The maxim is also read as “*al-’ada muhkama*”, meaning “cultural usage is definitive,” implying that customary usage has authority similar to fundamental textual precepts of the law.⁴⁹⁷

Al-Qarafi, a renowned thirteenth-century jurist, declared: “*Persons handing down legal judgments while adhering blindly to the texts in their books without regard for the cultural realities of their people are in gross error. They act in contradiction to established legal consensus and are guilty of iniquity and disobedience before God, having no excuse despite their ignorance; for they have taken upon themselves the art of issuing legal rulings without being worthy of that practice.... Their blind adherence to what is written down in the legal compendia is misguidance in the religion of Islam and utter ignorance of the ultimate*

⁴⁹⁷ The Hanafi and Maliki Schools gave culture greatest reign. In the Maliki School, the authority of cultural norms may be invoked to specify or restrict the application of contrary, general legal precepts on grounds of judicial preference (*istihsan*). See ‘Umar Faruq Abd-Allah, *Islam and the Cultural Imperative*, A Nawawi Foundation Paper, 2004, p.13.

*objectives behind the rulings of the earlier scholars and great personages of the past whom they claim to be imitating.”*⁴⁹⁸

Ibn Qayyim, a great Hanbali scholar of the following century, commended **al-Qarafi** by saying: *“This is pure understanding of the law. Whoever issues legal rulings to the people merely on the basis of what is transmitted in the compendia despite differences in their customs, usages, times, places, conditions, and the special circumstances of their situations has gone astray and leads others astray. His crime against the religion is greater than the crime of a physician who gives people medical prescriptions without regard to the differences of their climes, norms, the times they live in, and their physical natures but merely in accord with what he finds written down in some medical book about people with similar anatomies. He is an ignorant physician, but the other is an ignorant jurisconsult but much more detrimental.”*⁴⁹⁹

This approach of following the most culturally appropriate opinion is similar to the option of following the opinion that shows the greatest concern for *maslahah* or the *Maqasid* (above). Concern for cultural sensitivity is also why following the opinion of local scholars, particularly local *muftis*, is important especially on issues of local import. It is also what make it problematic to outsource an effective “international Mufti”. It should be noted that the recognition of culturally-appropriate rulings do not equate to permitting cultural biases that violate the values and higher objectives of the *Shari’ah*.

7. Go with the Opinion of Specialist Scholars in the field or subject of concern

Allah says in the Qur’an 21:7, *“Ask those who know if you do not know”*.

As with medical doctors, some are General Practitioners (GPs) while others are specialists. Among scholars of the Islamic Sciences, it is similar. Even within a field like *Fiqh* (Islamic jurisprudence) you have those who have greater expertise in only one School of juristic Thought, and even there, some have specialized in very specific subjects or topics such as Islamic Finance, Laws of Inheritance, Inter-faith Relations, Gender Equity, Bio-Medical issues,

⁴⁹⁸ ‘Adil Quta, *Al-‘Urf*, 1:64-65, cited in ‘Umar Faruq Abd-Allah, *Islam and the Cultural Imperative*, A Nawawi Foundation Paper, 2004, p.6-7

⁴⁹⁹ Ibid.

Islamic Political Thought, Child Custody, Divorce Laws, Legal Punishments, Muslim Minorities, etc. Some have also done a comparative study of various views from different Schools of Jurisprudence on specific topics.

According to **Ibn Taimiyyah**, “the highest authorities on any issue are the pious people who are specialists in that field”⁵⁰⁰. He also said, “Verdicts should be based on knowledge of experts in a field”⁵⁰¹.

Some scholars also quote the following hadith of the Prophet (ﷺ) as requiring Muslims to be cognizant of the specialization of scholars: “*You are more knowledgeable regarding your worldly affairs (dunyakum); and regarding the affairs of your faith (dinukum) then refer to me*”⁵⁰².

Specialists may be in the best position to advice on specific issues of concern. Unfortunately, many positions held by specialists who have done deep research on a particular topic within a certain context are “minority opinions” and are therefore not well known or sufficiently appreciated and respected by other scholars who are not specialists in that field. In contemporary society, this is often done by academicians. A jurist who is a well-grounded specialist in a subject or aspect of *fiqh* is often referred to as a *Mujtahid Muqayyid*⁵⁰³ because they are also experts in the methodology of *Ijtihad* (*Usul al-Fiqh* and *Maqasid al-Shari’ah*, etc.) as it applies to their specific field.

8. Go with the Easiest and most Convenient among Acceptable Opinions

Allah says in the Qur’an 2:185, “Allah desires ease for you, and He does not desire hardship for you”, and “*God does not intend to inflict hardship on you*”⁵⁰⁴. A’isha reported that the

⁵⁰⁰ Ibn Taymiyyah, *Majmu’ al-Fatawah*, vol.29, p.36 – cited in Sa’ad bin Abdullah al-Bariq, *Fatawa al-Fadhaiyyat*, Rabita al-Alam al-Islamiy, Jeddah, p.40-43.

⁵⁰¹ Ibn Taymiyyah, *Majmu’ al-Fatawah*, vol.29, p.493 – cited in Sa’ad bin Abdullah al-Bariq, *Fatawa al-Fadhaiyyat*, Rabita al-Alam al-Islamiy, Jeddah, p.18.

⁵⁰² Ibn Majah, no.2471; Ibn Hibban, no.22; Muslim, no.2364; *Silsilah al-Sahihah*, no.3977 – cited in Sa’ad bin Abdullah al-Bariq, *Fatawa al-Fadhaiyyat*, Rabita al-Alam al-Islamiy, Jeddah, p.18.

⁵⁰³ This is a scholar who has reached the proficiency of a *Mujtahid* but specialized in a specific topic or field, as opposed to a more “absolute” or “all-rounder *Mujtahid*” usually referred to as a *Mujtahid Mutlaq*.

⁵⁰⁴ Qur’an 5:6

tradition (*sunnah*) of the Prophet was to take the easier option from legitimate alternatives. She said, “The Prophet was not given a choice between two things, but he would chose the easiest one if it is not a sin.”⁵⁰⁵ The Prophet (ﷺ) is also reported to have said, “This religion is easy. No one will make it difficult for himself except that he will be overwhelmed by it.”⁵⁰⁶

Ease, facilitation (*taysir*)⁵⁰⁷ and gentleness or magnanimity (*samahah*) are among the explicitly clear and definitive (*qati'*) text-based objectives (*maqasid*) of *Shari'ah*⁵⁰⁸, and Muslims are not expected to make the religion unnecessarily over-bearing on themselves or on others.⁵⁰⁹ Just because a position is more difficult, rigid, inconvenient or less liberal does not make it a better or stronger opinion. The Qur'an and *Sunnah* clearly indicate the contrary. Creating hardship and makings things unnecessarily difficult are not among the *maqasid* of *Shari'ah*, and the Prophet (ﷺ) warned against extremism in seeking difficulty or making the religion difficult for others.

The Prophet also said, “*Make things easy for people and do not make things difficult. Give glad tidings to people and do not drive them away.*”⁵¹⁰ He is also reported to have said, “*You have not been sent like those who have been given hardship. Rather, you have been sent as those who have been given ease or facility.*”⁵¹¹ In another tradition, the Prophet (ﷺ) is reported to have said to his companions: “*You (as Muslims) have been sent to make things easy (for the people) and you have not been sent to make things difficult for them.*”⁵¹²

Based on the above and more, it is important to recognize that when scholars differ on an issue, consideration is also given to the opinion that is easier to follow. This is very important especially for new Muslims and those who already find the basic teachings of Islam a challenge. Living a life of integrity, and dedication to personal growth and service to others

⁵⁰⁵ *Sahih al-Bukhari*, hadith no.6786.

⁵⁰⁶ *Sahih al-Bukhari*, hadith no.39.

⁵⁰⁷ Jasser Auda, *Maqasid al-Shari'ah: A Beginner's Guide*, IIIT, London, 2008, p.30.

⁵⁰⁸ Ibn Ashur, *Treatise on Maqasid al-Shari'ah*, IIIT, London, 2006, p.56, 87-90.

⁵⁰⁹ Two of the 5 major maxims of *Shari'ah* are that, “Hardship must be removed”, and “Hardship begets facility”. See earlier discussion on the *Qawa'id al-Fiqhiyyah* (Legal Maxims) in Lesson 30.

⁵¹⁰ *Sahih al-Bukhari*, hadith no. 4342 and 4344/4345; Muslim, hadiths no. 1733.

⁵¹¹ *Sahih al-Bukhari*, Dar Tawq al-Najah, 1422 AH, vol.1, p.230, no.220; Sunan Abu Dawud, Ministry of Awqaf, Egypt, vol.1, p.145, no.380.

⁵¹² This is part of a long hadith in al-Bukhari hadith no. 220, and 6128.

already comes with its sacrifices and hardships. Allah – Whom we serve - does not advocate making a life of submission to His guidance more difficult than it may already be.

This is one of the reasons scholars engage in **Talfiq** – the mixing of or choosing from various scholarly opinions – so as to attain the objectives of ease, facilitation, gentleness or magnanimity (*taysir* and *samahah*) for people in various circumstances.

As discussed earlier (in Lesson 42), this *talfiq* becomes even more important when persons are faced with a “need” (*hajah*) that is not serious enough to be considered as “necessity” (*darurah*). This is not “looking for loopholes” in the law, but a means of benefiting from the legitimate diversity of perspectives and scholarly opinions to achieve a clear and explicit (*qati'*) text-based objective of *Shari'ah*.

9. Go with the Position of the Leadership or those in Authority⁵¹³

Allah says in Qur'an 4:59, “...Obey Allah and obey the Messenger, and those in authority amongst you.” In a number of authentic narrations, the Prophet (ﷺ) is reported to have said, “Listen and obey (your leaders)!”, “Listen and follow your leader even if it is an Ethiopian slave that is made your leader”.⁵¹⁴

According to **Ibn Abidin**, leaders should be obeyed so long as they do not make you commit a clear prohibition (*haram*) or require you to neglect a clear obligation (*Fard*). Leaders should be obeyed even if they stop you from a recommendation (*mustahab*) or *mubah*, or if they ask you to do a discouraged action (*makruh*), as this does not involve sinning against Allah.⁵¹⁵

As stated earlier on, decisions made by the leadership are often made based on what the authorities view as being in the best interest (*maslahah*) of the society. A relevant maxim is, “The affairs of the leader (*imam*) concerning his people are judged by reference to

⁵¹³ See: Khaled Abou El-Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, UK, 2001, p.112-131.

⁵¹⁴ *Sahih al-Bukhari*, Dar Tawq al-Najah, 1422 AH, vol.18, p.52, no.7142. For many other traditions and juristic arguments prescribing obedience to leadership, See Khaled Abou El-Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, UK, 2001, p.112-118.

⁵¹⁵ Cited in Shaykh Abdullah bin Bayyah, *Sacred Law in Secular Lands* (Vol.1 and 2, 18 audio CDs), trans. from Arabic by Hamza Yusuf (California, USA: Alhambra Productions, 2000).

maslahah” (*Amr al-Imami fi shu’unar-ra’iyyatimanutun bi al-maslahah*).⁵¹⁶ The leadership may for various legitimate reasons not put the general public or even the religious scholars (*ulama*) in the full picture of the reasons for some of its decisions. Sometimes, even if the leadership does explain its reasons, not everyone will be convinced. The society is expected to trust its leadership with its responsibilities, and show loyalty in the interest of the greater good of all.

The tolerance and respect for leadership even when they are wrong often ensures the preservation of the objectives (*maqasid*) of social cohesion and unity, and avoidance of the often much greater evil (*mafsada*) of anarchy and lawlessness (*fitnah*). This does not preclude the need to enjoin right and forbid wrongs done by the leadership through means that do not make a bad situation worse. Imam Malik is often quoted as saying, “sixty years of oppression is better than an hour of anarchy”.⁵¹⁷ So while persecution or “oppression can be worse than slaughter”⁵¹⁸, anarchy can be worse than oppression. A state of anarchy is usually always taken advantage of by those who often abuse power even more, and sustain enduring oppression.⁵¹⁹

10. Follow what puts your conscience at ease and what you are ready to meet Allah with

When scholars differ on an issue, each individual is ultimately responsible for his/her decision of which option to pick from the list above. If a person believes he or she is competent enough to determine which is the “stronger opinion”, then he or she should go with that. If the person feels he or she lacks competence to make such an assessment, then

⁵¹⁶ Mohammad Hashim Kamali, *Qawa'id Al-Fiqhiyyah: The Legal Maxims of Islam*, The Association of Muslim Lawyer, 1998, p.1.

⁵¹⁷ Shaykh Abdullah bin Bayyah, *Sacred Law in Secular Lands* (Vol.1 and 2, 18 audio CDs), trans. from Arabic by Hamza Yusuf (California, USA: Alhambra Productions, 2000).

⁵¹⁸ Qur'an 2:191

⁵¹⁹ The various juristic opinions regarding how to change oppressive rulers and governments is beyond the scope of this material. Those interested may consult other important works such as Khaled Abou El-Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, UK, 2001; See also, “The Peaceful Method of Social and Political Struggle” in Shaykh-ul-Islam Dr. Muhammad Tahi-ul-Qadri, *Fatwa on Terrorism and Suicide Bombing*, Minhaj-ul-Quran International, London, 2010, p.397-413.

he or she may have to simply trust those who know better, be it a specialist, the majority of scholars, local scholars, the leadership, etc.

However, even experts may differ or may reach a conclusion which troubles one's sincere conscience. In such a case, one should remember that we will ultimately come before Allah with our decisions. One should, therefore, follow the position or opinion one is ready to meet Allah with.

Allah in the Qur'an praises "*those who listen to what is said, and follow what (they believe) is the best (meaning or) opinion.*"⁵²⁰ The Prophet (ﷺ) said, "Consult your heart, even if others give you *fatwa*, upon *fatwa*, upon *fatwa*."⁵²¹ Ultimately, "*Actions are judged by their intentions.*"⁵²²

The 10 recommendations given above are not mutually exclusive. A combination of say the "easiest" opinion of the "majority" of "local" "specialists" is possible, and may be best for one context but not necessarily for another. The person being asked, the person asking, and the context and consequences (and who is to live with the consequences!) may all play a role in deciding "the best" course of action.

In conclusion, whatever opinion we may ultimately decide upon and believe is "best" or "stronger" from our own analysis of all relevant factors, that is still our preferred opinion and "relative truth" based on our own perspective, inclinations and biases, or those of someone else/the scholar whose opinion we choose. As correct as we might like to believe we are, there is always the possibility that we might be wrong - and sometimes, very wrong! **Imam Shafi'i** was reported to have said, "I believe I am right, with the possibility that I might be wrong; and I believe the contrary opinion is wrong with the possibility that it is correct".⁵²³

⁵²⁰ Qur'an 39: 18

⁵²¹ Sheikh Muhammad Nasir al-Deen al-Albaani records this in his book, *Saheeh al-Jaami' as-Sagheer* vol.1, p.321. Another version of the hadith says, "*Istaftiqalbak, wa-istaftiqalbak, wa-istaftiqalbak,*" reported by Abdullah bin Abdur Rahman, *Sunan al-Darimi*, no. 2533.

⁵²² *Sahih al- Bukhari*, no. 1; Muslim, no. 5036.

⁵²³ Shaykh Abdullah bin Bayyah, *Sacred Law in Secular Lands* (Vol.1 and 2, 18 audio CDs), trans. from Arabic by Hamza Yusuf (California, USA: Alhambra Productions, 2000); Taha Jabir Al- Alwani, *Ethics of Disagreement in Islam*, The International Institute of Islamic Thought, Herndon, Virginia, USA, 1993.

Imam Sufyan At-Thawri was also reported to have said, "*If you see a man doing something over which there is difference of opinion among scholars, and which you believe to be forbidden, you should not forbid him from doing it.*"⁵²⁴

In the absence of a clear explicit text (*nass*) of the Qur'an or multiple-chained (*mutawatir*) hadith making an act or belief obligatory (*fard*) or prohibited (*haram*) as agreed upon by the scholars of the *Ummah*, Muslims should learn to live and thrive with scholarly diversity of interpretations of the Qur'an, *Sunnah* and other Islamic sources of jurisprudence and *ijtihad*.

Ahmad bin Hanbal, when told by one of his students (Ishaq bin Bahlul al-Anbari) that he had written a book on juridical differences which he had named "The Core of Divergence" (*Lubab al-Ikhtilaf*), Imam Ahmad said, "Name it: 'The Book of Leeway' (*Kitab al-Sa'a*) and not 'The Core of Divergence'."⁵²⁵

DISCUSSION QUESTIONS:

1. List at least 7 alternative courses of action that a person could take when scholars differ on a particular issue.
2. When scholars differ on an issue what is the advantage of seeking the "strongest" opinion, and why is it probably the most challenging alternative?
3. In deciding between alternative scholarly opinions, what is the basis for the validity of going with the opinion that is most in line with the higher objectives (*Maqasid*) of Shari'ah?
4. What is "*talfiq*", and how is it different from conveniently picking and choosing from alternative opinions based purely on self-seeking motives?

⁵²⁴ Quoted in Abdal Hakim Murad, *Understanding the Four Madhhabs*, Cambridge, Muslim Academic Trust, 1999, p.13.

⁵²⁵ Ibn Abi Ya'ala, *Tabaqat al-Hanabilah* vol.1, p.111; Ibn Muflih, *al-Maqsad al-Arshad fi Dhikr Ashab al-Imam Ahmad*, vol.1, p.248; and Ibn Taimiyyah, *Sharh al-Umda*, vol.4, p.567; *Majmu' al-Fatawa*, vol.14, p.159; Ibn Taymiyyah, *Muswaddat fi Usul al-Fiqh*, p.401; all cited in Gibril Fouad Haddad, *The Four Imams and their Schools*, Muslim Academic Trust, London, UK, 2007, p.313.

5. Why is going with the opinion that is most in line with the *maqasid* of Shari'ah the preferred option for leadership, and not simply following what the leader believes may be the "strongest" opinion?
6. Discuss some positions you know that are accepted by each of the 4 *Madhhabs* that were originally "borrowed" or taken from other Schools of law.
7. Discuss a few reasons why some scholars insist that people should stick to the opinions of their respective *Madhhabs* (or Schools of law)?
8. What proofs (*adillah*) or tools of *ijtihad* do you think some would or could use to defend the position of sticking to one's own *madhhab*, and how credible would you consider such arguments?
9. Discuss the merits and demerits of advising everyone to stick to their own *Madhhab* in a more globalized society with scholars and followers from various backgrounds, especially among Muslim minorities and converts to Islam.
10. Why do some scholars suggest that it is sometimes better to follow the opinion of the majority of scholars on a particular issue?
11. What evidences are used by some to support the view that the opinion of the majority should be followed, and what are some of the possible challenges with this view?
12. Why do some scholars suggest that it is sometimes best to follow the opinion of local scholars?
13. What are the arguments used to support the view of following the opinion of local scholars, and what are some of the possible challenges with this view?
14. Is the scholarship of great foreign or distant scholars more or less important than the contextual knowledge of local scholars when deciding on an issue? How could this dilemma be minimized?
15. Why is it sometimes counterproductive and not very truthful or fair to cite the opinion of "most scholars" or that of a "greater scholar" of the past when discussing a local or contemporary issue?
16. Why is it important to re-assess the value of some past classical scholars' (or *Salafs*') or of long-standing "majority" opinions in light of original Primary and Secondary sources of Shari'ah or proofs (*adillah*) and present realities as analysed by contemporary (*Khalaf*) or local scholarship?

17. Why are cultural or customary considerations important in the choice of opinions on which scholars differ? How valid is this consideration?
18. Why is it potentially detrimental to outsource a *Mufti*?
19. Explain by use of a metaphor (as Ibn Qayyim did) the dangers of a scholar not considering local realities when formulating legal opinions (*fatwa*) on an issue.
20. What is the importance of specialist on any issue, especially in modern society, and what arguments are there for the credibility of expert opinion?
21. List some specific topics for which the ignorance or very little appreciation in respect for the opinion of a few specialist scholars have resulted in significant challenges within the Muslim community and for interfaith relations.
22. Discuss possible criteria or ways for lay persons to identify specialist scholars in a particular field or subject matter.
23. What is the basis and practical importance of the recommendation to go with the easiest and most convenient among acceptable or scholarly opinions?
24. What are some of the common reasons why some scholars prefer to give or choose opinions that are more difficult or stringent to follow?
25. From the perspective of *shari'ah*, what is wrong with a person deciding to always go with the easiest and most convenient opinion among alternative respected scholarly opinion or scholars of legal thought (*Madhhab*), so long as they do not contradict any of the established objectives (*Maqasid*) of *shari'ah*?
26. What would you regard as some of the criteria for the acceptability of "*talfiq*" – the mixing or choosing from various scholarly opinions?
27. What are the textual and rational bases of the recommendation to follow the scholarly opinion adopted by the political authorities or leadership and what objectives (*Maqasid*) does this try to achieve?
28. In light of the principle of "choosing the lesser of two evils", "opening of means" (*fath al-dhari'ah*) and the concept of "license" (*rukhsah*), how would you balance the need for obedience to Allah's will and justice, with obedience to a despotic or unjust leadership for the sole purpose of preserving the *maqasid* of unity, social cohesion and preventing greater evil (*mafsada or fitnah*)?

29. Why would some scholars have legitimate fears and concerns about the option of following the opinion of those in authority/leadership, and how can these concerns be managed to prevent greater challenges?
30. What are the bases for the recommendation that a person can or should follow the opinion that they sincerely believe puts their conscience at ease, and which their hearts are more settled with?
31. How would you distinguish “following your conscience” from “follow whatever you like”?
32. How would you judge other people’s choices using the criteria of “what puts the conscience at ease”? How objective or subjective is such a criteria?

LESSON 44: AGREEING TO DISAGREE AGREEABLY!

The common reasons for disagreement among scholars have already been discussed earlier on. Understanding how and why scholars differ helps us in appreciating qualifications and their efforts to get to what would best represent the Prophet (ﷺ) in his absence and also be pleasing to Allah.⁵²⁶

The following pieces of advice are meant to assist Muslims in keeping unity of purpose in mind, cooperating in enjoining right and forbidding wrong, and in realizing the agreed objectives of *Shari'ah* in spite of their other differences:⁵²⁷

- Respect differences of opinions and perspectives - they are not new, and they will always be there! The catch cry, “Even fingers are not equal, and yet they cooperate!” is relevant here. Also, “*And if your Lord had so willed, He could surely have made you all one single community: but [He willed it otherwise] in order to test you by means of what he has revealed unto you. Compete then with one another in doing good works! Unto Allah you all must return; and then he will make you truly understand all that about which you differed.*” (Qur'an 5:48)

One of the most interesting applications of juristic discretion (*istihsan*) is when it is based on the legal principle of “heeding dissent” (*ri'ayat al-khilaf*). Scholars would sometimes “heed the dissent” of other prominent jurists by modifying their own opinions, not just for the sake to unity, but out of “respect for the other opinion” or school.⁵²⁸

- Do not allow differences of opinion to threaten the greater *maqasid* i.e. brotherhood and unity. These are clear obligations (*fard/wajib*) based on the Qur'an and *Sunnah*. Difference of opinion is not equivalent to disunity; and unity does not mean uniformity. A monoculture of the minds is not healthy for social progress and an anonymous speaker

⁵²⁶ Ali Gomaa, *Responding from the Tradition*, Fons Vitae, 2011, p.20-24, and Shaykh Abdullah bin Bayyah, *Sacred Law in Secular Lands*, (Vol.1 and 2, 18 audio CDs), trans. from Arabic by Hamza Yusuf (California, USA: Alhambra Productions, 2000).

⁵²⁷ According to Ibn Taymiyyah, the *Sahabah* Umar bin al-Khattab and Abdullah bin Mas'ud differed on over a hundred issues of jurisprudence (*fiqh*).

⁵²⁸ Al-Shatibi, *Al-I'tisam*, 2:329-330 – cited in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.164-165.

once said, “Our hearts should be at peace with each other even if our minds are at war”. A major *maqasid* such as unity and cooperation should not be compromised for the lesser one.

- Concerned Muslims should study the ethics and etiquettes of disagreement in Islam so as to improve their skills in how to agree to disagree in a more agreeable manner. Etiquette, civility, gentility, courtesy and proper decorum lubricate areas of frictions and reduce the negative emotional content of disagreements.
- A Muslim should believe that he or she just could be wrong! Unfortunately, we often never know we are wrong until someone else points it out to us. The ego uses defensiveness to protect its ignorance and its illusion of certainty. The shame of being wrong often keeps arguments going on longer than they should. Objectivity is in believing in our subjectivity. The statement that ultimately “only Allah knows best!” should not become just a platitude but a statement made out of sincere humility, conviction and faith!
- A Muslim should always be **curious** to understand others better, **humble, sincere** and **prayerful** in the search for guidance and truth; and to please Allah and be **committed** to putting truth into action.

DISCUSSION QUESTIONS:

1. In what ways are the purification of the heart and our sincerity the ultimate determinants of the quality of our choices and position in the eyes of Allah?
2. How does a person who is wrong about a particular opinion feel about that opinion before it is made clear to them that they are wrong?
3. How should our answer to Question (2) influence the way we approach those we would like to correct?
4. How should our answer to Question (2) affect the way we view our own “correct” opinions, and our readiness to cross check or modify them if we are sincere about truth for the sake of Allah?

5. What reasons could there be for not forbidding someone from doing something you believe is wrong, even though there is difference of opinion among scholars over it?
6. When, if at all, do differences of opinion among scholars or among followers justify violence? (Apply this question to various sects in Islam, and to people of other faiths, or no faith).
7. Discuss some of the practical benefits of differences of opinions and why it is important to learn to agree to disagree agreeably.
8. What is the relationship between *Usul al-Fiqh/Maqasid al-Shari'ah* and the Ethics of Disagreement in Islam?

LESSON 45: LET'S REVIEW!

DISCUSSION QUESTIONS:

Find a partner to discuss the following:

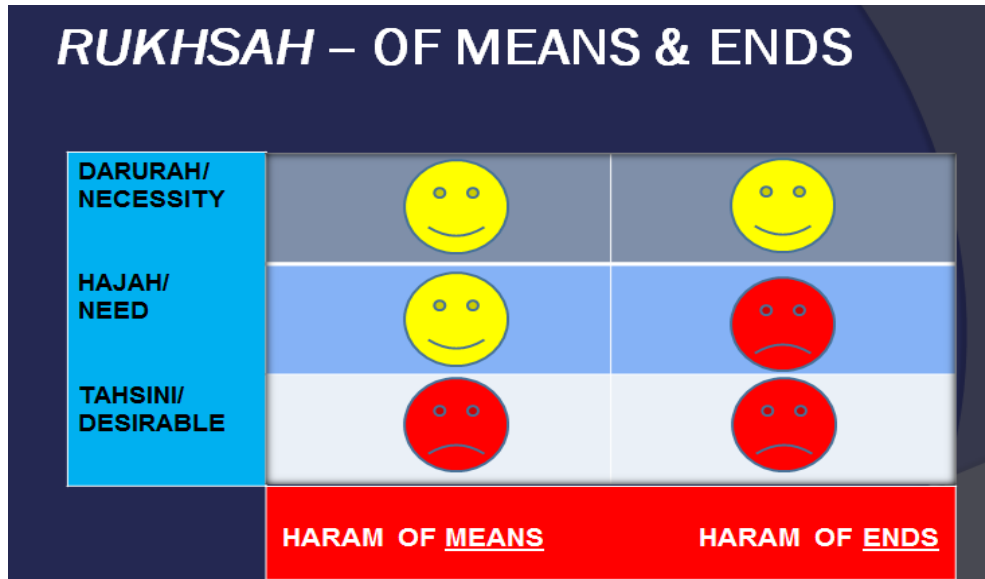
1. What are the two broad categories of *maqasid*?
2. List 3 conditions that should be met before the concept of *maslahah al-musralah* is applied?
3. Describe two instances of *Sahaba* using *maqasid* to determine legal liability.
4. Discuss an example of an action wherein *maqasid* may not necessarily be used to determine legality.
5. If one of the *Maqasid al-Shari'ah* is the protection of life and health, what are some indices to measure the attainment of this in society?
6. Discuss the 5 “Levels of Why” with respect to the question, “Why abstain from alcoholic drinks?”
7. Lesson 41 states:

The mere fact that it is possible for a permissible action to lead to an undesirable end does not automatically mean it would be better to prohibit it. Most actions have a mixture of both desirable and undesirable consequences, or side-effects in terms of advantages and disadvantages. These have to be weighed to determine what **the over-riding effect of an action** is, and whether the effect is **significant or insignificant**. If the harm is significant and greater than the benefit, then it would be prohibited. If the benefit is significant and greater, then it would be permitted.

Give an example of a contemporary action which may be evaluated to have greater benefit than harm, where both effects are significant.

8. Explain the following statement: “The severity or degree of harm or benefit is, on its own, not sufficient for scholars to decide upon opening or blocking a means.”

9. Explain the diagram below:



10. Give an example of what this passage is referring to:

...allowing people to freely pick and choose from any School of Juristic Thought could lead to concocted opinions or conclusions that do not go in line with the analysis or methodology of any *Mujtahid*. This approach could as well easily create loop-holes that could be used as legal stratagems and tricks (*hiyal*), whereby the objectives(*maqasid*) of *Shariah* are abused using “legally acceptable” means that do not contradict the literal text of the Qur’an and Sunnah or *Ijma*.

11. Give only three sentences of advice to a Muslim expecting to face major disagreements in a dialogue with another Muslim.

SECTION 8: ENGAGING DIVERSITY IN THE SEARCH FOR TRUTH

LESSON 46: THE FINALE WITH APOLOGIES

Congratulations, this is the final lesson! Today, we shall review, in your own words, the major take-away points that stood out for you from the course.

We would like you to kindly go back to **Lesson 1** and record **five golden nuggets** you are taking away from this course.

But first, we owe you some apologies!.....

We're terribly sorry but, in spite of going through a lengthy manual and intensive training in *Usul al-Fiqh* and *Al-Maqasid al-Shari'ah*,

- You are still not a *Mujtahid*! You are still not a *Mufti*! You are still not a scholar!
- You are just like most of us – a beginner and a student of this great field, actively engaged in *da'wah*, in sharing the beauty of Islam with others – but always a student trying to understand Islam better and get closer to Allah by serving Him and His creation better.
- You are, however, hopefully a little less gullible when it comes to the '*fatwas*' issued by many "*Sheikhs*" and "*Imams*", including those of the online variety!
- You are, hopefully, also more proud and confident about Islam, its ability to coexist with modernity, its interest in benefitting humanity, and its respect for intellectual exertion.

We ask you to pray for all your fellow students on this path, and may Allah continue to forgive us all for our mistakes.

If there are aspects of this course that you disagree with, kindly send your feedback for improvement to dawahinstitute@gmail.com and remember Allah's words:

Give glad tidings to those who listen to what is said and take the best meaning in it. Upon them is Allah's guidance, and it is they who use their intellect.

(Qur'an 39:18)

Unto Allah you all must return; and then He will make you truly understand all that about which you differed.

(Qur'an 5:48)

Lastly, as always, Allah knows best! Thank you!

Wassalamu 'alaikum warahmatullah wabarakatuh.

FINAL DISCUSSION EXERCISE:

1. Go back to Lesson 1 and as you flip through all the pages of this material, record the 5 most important lessons you are taking away from this course. Kindly share the most important **ones** with your colleagues.

APPENDIX I

A PROPOSED CLASSIFICATION OF SCHOLARS AND THEIR FIELDS ⁵²⁹

1. **Qur'anic exegesis:** Today, the most well-known exegetes from various schools are: Ibn Kathir, al-Tabari, al-Baydawi, al-Zamakhshari, al-Razi, al-Shinqiti, al-Baghawi, Abu al-Saud, al-Sa'adi, al-Nasafi, al-Tabtaba'i, al-Qummi, al-Tusi, Sadr al-Mut'allihin, al-Wahidi, al-Tha'alibi, al-Suyuti, al-Qurtubi, al-Alusi, al-Samarqandi, al-Kashai, al-Janabidhi, Abdul-Jabbar, al-Sam'ani, Ibn Taimiyyah, al-Shawkani, al-Mawardi, al-Habri, al-Kufi, al-Hawwari, Itfeesh, and al-Khalili.
2. **Hadith collections:** The most popular compilers of standard hadith collections from various schools are: al-Bukhari, Muslim, al-Hakim, Ibn al-Jarud, Ibn Hibban, Ibn Khuzaimah, al-Bayhaqi, al-Nassa'i, Abu Dawud, Ibn Majah, al-Tirmidhi, al-Daraqutni, al-Darami, Ibn Babawayh, al-Tahnawi, Malik, al-Shafi'i, Abu Hanifa, Abdul-Razzaq, al-Tabari, al-Tabarani, Ibn Abu Shaybah, al-Bazzar, al-Rabi' Ibn Habib, al-Killini, al-Majlisi, and al-'Amili.
3. **Fiqh and Usul:** The following jurists are the most prominent in their respective Schools of Islamic Law, and their edited manuscripts are now considered 'textbooks' for studying these schools:
 - I. **The Hanafi School:** Abu Hanifa, Abu Yusuf, Mohammad ibn al-Hasan, al-Sarakhsi, al-Bazdawi, Ibn Nujaym, al-Razi, al-Merghayani, al-Kasani, al-Zayla'i, al-Samarqandi, al-Tahawi, al-Siwasi, Ibn Musa, al-Lakanawi, Shaikhizadah, Ibn al-Humam, and Ibn 'Abidin.
 - II. **The Malik School:** Malik, Ibn Wahb, Sahnun, Ibn al-'Arabi, al-Qarafi, al-Mawwaq, al-Abdari, al-Tha'labi, al-Qayrawani, al-Ghirnati, ibn Farhun, al-Kharshi, al-Wansharisi, al-Shadhili, al-Baji⁵³⁰, and al-Sunusi.

⁵²⁹ Sources: Jasser Auda, *Islamic Law: Maqasid al-Shariah as Philosophy of Islamic Law*, p. 157 – 158.

⁵³⁰ Jasser Auda omits Al-Baji (Abu al-Walid al-Baji) from the list of Maliki scholars, and has him listed under the Mu'tazili School. Al-Baji also followed an Ash'ari school of theology (DIN editors).

- III. **The Hanbali School:** Ibn Hanbal, al-Marwazi, al-Khallal, Ibn Taimiyyah, Ibn al-Qayyim, al-Tufi, Ibn Rajab, Ibn al-Lahham, Ibn Battah, al-Mirdawi, al-Bahwati, al-Maqdisi, Ibn Muflih, Ibn Qudamah, al-Baghawi⁵³¹, al-Zarkashi, al-Marwazi, al-Ba'li, and al-Kharqi.
- IV. **The Zaydi School:** Zayd, al-Wasiti, Ibn al-Zabarqan, Ibn Muzahim, Ahmad Ibn 'Isa, al-Qasim, al-Hadi, Ibn Ishaq, al-Ansi, Ibn al-Murtada, Ibn Muftah, and recently, al-Shawkani.
- V. **The Ibadi School:** Jabir ibn Zayd, al-Busaidi, Itfeesh, al-Bahlawi, Ibn Ja'far, al-Hawari, al-Salimi, al-Shamakhi, al-Autabi, and al-Shaqsi.
- VI. **The Ja'fari School:** Ja'far, al-Killini, Ibn Babawayh, Ibn Qawlawayh, Ibn al-Junaid, al-Saduq, al-Mufid, al-Murtada, al-Tusi, al-Khu'i, al-Hasan al-Hilli, al-Muhaqqiq al-Hilli, al-Mutahhar al-Hilli, al-'Amili, al-Tabtaba'i, and al-Najafi.
- VII. **The Shafi'i School:** Al-Shafi'i, al-Qaffal al-Shashi, al-Juwayni, al-Ghazali, al-Mawardi, al-Shirbini, al-Fairuzabadi, al-San'ani, al-Nawawi, al-Hadrami, al-Haithami, al-Bijirmi, al-Shirazi, Ibn al-Salah, al-Ansari, Ibn Raslan, al-Subki, Qalyubi, 'Umayrah, and al-Ramli.
- VIII. **The Zahiri School:** Dawud and Ibn Hazm.
- IX. **The Mu'tazili School:** 'Abdul-Jabbar, Abu al-Hussain al-Basru, Abu Hashim, al-Ka'abi, al-Jubba'i, Ibn Khallad, al-Nazzam, al-Baji, Ibn al-Hudhail, and Abu Muslim.

⁵³¹ Al-Baghawi was a Shafi'i scholar and not Hanbali - See <https://en.wikipedia.org/wiki/Al-Baghawi>

APPENDIX II

SOME MAJOR CLASSICAL SCHOLARS AND THEIR SCHOOLS OF JURISTIC THOUGHT (*MADHHABS*)⁵³²

Hanafi *Madhhab*

Abu Hanifah
Abu Yusuf
Muhammad bin Hasan
Zufar
Ibrahim bin Tahman
Hafs bin Giyas al-Qadi
Ibn Abideen
Abu Sulaiman Musa bin Sulaiman al-Juzajani
Malik bin Mansur Al-Razi
Shaddad bin Hakim al-Qadi
Abdullah bin Dawud
Hisham bin Ubaidillah Al-Razi
Al-Hakam bin Ma'bad al-khuza'i
AbuJa'far Ahmad bin Muhammad al-Tahawi
Ibn Abu al-'Izz Al-Dimashqi
Mahmud Shukri al-Alusi
Muhammad Siddiq Hasan Khan
Muhammad Bashir bin Muhammad Sahsawaani

Maliki *Madhhab*

- Malik bin Anas bin Malik bin Abu 'Amr
- Abdullah bin Wahb

⁵³²Al-Dhahabi, *SiyarA'lam al-Nubalu*, al-Maktabah al-Shamilah 3.13; al-Dhahabi, *Tarikh al-Islam wa Mashaheer al-A'lam*, Dar al-Kitab al-'Arabi, Beirut, 1410; Muhammad bin Muhammad Abu Ya'la, *Tabaqaat al-Anabilah*, Dar al-Ma'rifah, Beirut; Ali bin Abd al-Kafi al-Subki, *Tabaqat al-Shafi'iyyah al-Kubrah*, al-Maktabah al-Shamilah 3.13; Ali bin Husain bin 'Asakir, *Tarikh Madinah Dimashq*, Dar al-Fikr, Beirut, 1415; Abdul Rahman bin Abd al-Lateef Aa al-Shaikh, *Mashaheer 'Ulama' Najd wa Ghairihim*, Dar al-Yamamah, 1394; Abd al-Rahman bin 'Ali bin Muhammad Abu al-Faraj Ibn al-Jawzi, *al-Muntazim fi Tarikh al-Muluk wa al-Umam*, Dar al-Kutub al-'Ilmiyyah, Beirut, 1412.

- Abdul-Rahman bin Al-Qasim bin Khalid bin Janadah
- Ash-Hab bin Abdul al-Aziz
- Abd Salam bin Sa'id al-Sahnuun
- Asbag bin al-Faraj
- Asad bin al-Furat
- Al-Qadi Abubakr Ibn al-Abhari
- Abu 'Amr al-Talmanki
- Abubakr Muhammad bin Muhib
- Al-Qadi Isma'il bin Ishaq
- Abdullah bin Muhammad al-Qahtaani
- Abdul Malik bin Abdul-Aziz bin Abdullah bin Abu Salamah Al-Maajishun
- Zayyad bin Abd al-Rahman
- Yahya bin Yahya Al-Laithy
- Abul Walid Sulayman al-Baaji
- Qadi Abubakr Ibn al-'Arabi
- Abu Umar Yusuf bin Abdulbarr
- Khalil bin Ishaq Al-Jundi
- Abu Amr 'Uthman bin Sai'd bin 'Uthman bin Sa'id bin Umar al-Umawi
- Imam Muhammad Al-Amin al-Shinqiti

Shafi'i *Madhhab*

- Imam Muhammad bin Idris al-Shafi'i
- Ibn Hibban
- Ibn Salah
- Ibn Nahas
- Harmalah bin Yahya
- Abu 'Uthman al-Sabuni
- Ibn Abu Hatim
- Ibn Thumamah
- Abu al-Qasim al-Bagawi
- Abu al-Fida' Ismai'l bin Kathir
- Abu al-Hasan al-Ash'ari
- Muhammad bin Nasr al-Mirwazi
- Ibn Sinni Ahmad bin Muhammad Al-Dinawari
- Abu al-Qasim al-Lalika'i

- ‘Uthman bin Sa’id al-Darimi
- Abubakar Ahmad bin al-Husain al-Baihaqi
- Al-‘Izz bin Abd al-Salam
- Taqi al-Deen al-Subki
- Abu Zakariyya Yahya bin Sharaf al-Nawawi
- Abu Hamid al-Ghazali
- Abu Nu’aim al-Asbahani

Hanbali *Madhhab*

- Imam Ahmad bin Hanbal
- Abdullah bin Ahmad bin Hanbal
- Abu Dawud Al-Sijistani
- Abu Ishaq Ibrahim bin Ishaq bin Ibrahim al-Harbi
- Ahmad bin Muhammad bin Harun Al-khallal
- Al-Hasan bin Ali bin Khalaf Abu Muhammad al-Barbahari
- Ahmad bin Salman bin al-Hasan Abu-Bakr al-Najjad
- Ubayd Allah bin Muhammad Abu Abd Allah al-Ukbari (known as Ibn Batta)
- Muhammad bin al-Qadi Muhammad Abu Ya’la bin al-Husayn (known as Abu Ya’la)
- Ibn Abu Ya’la Muhammad bin Husain
- Ibn Qudamah Abdullah bin Ahmad
- Abd al-Gani al-Maqdisi
- Ahmad bin Taimiyyah bin Abd al-Haleem bin Abd al-Salam
- Abu Abdullah Muhammad bin Abubakr bin Qayyim
- Ibn Rajab al-Hanbali
- Ibn Immad Abdullah al-Hanbali
- Ibn Muflih Ibrahim bin Muhammad bin Abdullah
- Al-Mirdaawi Ali bin Sulaiman
- Ibn Badran Abd al-Qadir bin Ahmad bin Mustapha
- Abd al-Rahman bin Muhammad bin Qasim Al-Najdi
- Abd al-Rahman bin Nasir al-Sa’di

Zahiri *Madhhab*

- Dawud bin Ali Abu Sulaiman al-Asbahani Al-Bagdari

- Abu Muhammad Ali bin Ahmad bin Sa'id bin Hazm
- Abu 'Asim al-Dahaq Ahmad bin Muhammad bin 'Amr
- Ibrahim bin Jabir Abu Ishaq
- Abu al-Hasan Abdullah bin Ahmad bin Muhammad bin Al-Mugalis.
- Ahmad bin Abdullah bin Ahmad bin Ibrahim bin al-Bukhturi
- Abu Sai'd Al-ruqqi
- Al-Khazraji Abu al-Hasan Abdul Aziz bin Ahmad al-Asfahani.
- Mu'az bin Sulaiman
- Al-Qadi Khatib al-Andalus Mundhir bin Sa'id
- Abu Abdullah Muhammad bin Abu Nasr al-Futuuli bin Abdullah bin Futuuli bin Humaidi bin Yasl al-Azadi Al-Humaidi.
- Muhammad bin Ali bin Muhammad bin 'Arabi, Abubakar al-Hatimi Al-Ta'I (popularly known as Muhy al-Deen Ibn 'Arabi)
- Abubakar Muhammad bin Ahmad bin Muhammad bin Abdullah bin Ahmad bin Muhammad bin Abdullah bin Muhammad bin Yahya bin Sayyid al-nas al-Ishbeelyal-Ya'muri al-Andalusi
- Muhammad bin Yusuf bin Ali bin Yusuf bin Hayyan Al-Nafazi al-Jiyanai al-AndalusiAlmisri al-Zahiri
- Abu Haashim Ahmad bin al-burhan Muhammad bin Isma'il Al-Zahiri.
- Ahmad bin Muhammad bin Ismail bin Ibrahim bin Abdu al-Rahman bin Yusuf bin Sameer bin Hazm Al-Misri Al-Zahiri (popularly known as Ibn al-Burhan)

Major *Mujtahid* Imams

- Abu Hanifah
- Malik bin Anas
- Muhammad bin Idris al-Shafi'i
- Ahmad bin Hanbal
- Dawud bin Ali Al-Zahiri
- Al-Awza'i
- Sufyan al-Thawri
- Ibn Jarir al-Tabari Abu Ja'far
- Abu Thawr
- Muhammad bin Isma'il al-Bukhari
- Ibn Khuzaimah Abubakr Muhammad bin Is'haq

APPENDIX III

ISOLATED HADĪTH IN THE MĀLIKI SCHOOL OF THOUGHT ⁵³³

“One of the major points of difference between ‘Abū Hanīfah and Mālik, on the one hand, and ash-Shāfi’ī and ‘Ahmad ibn Hanbal, on the other, is the position they take on the authoritativeness of isolated hadīth as a valid, independent source of Islamic law. Whereas ash-Shāfi’ī and Ibn Hanbal regard them as authoritative, neither ‘Abū Hanīfah nor Mālik does, rather both of them regard isolated hadith as probably the weakest and least authoritative of the sources and principles of law to which they subscribe. As will be seen in this discussion, both ‘Abū Hanīfah and Mālik use isolated hadith only when they are corroborated by other more firmly established and less conjectural sources of law to which they subscribe. Hence, for them, isolated hadith can only be regarded as a dependent source of law or an ancillary to the other sources.

As ‘Abū Zahrah points out, ash-Shāfi’ī states explicitly in “*Ikhtilāf Mālik*” that Mālik often rejects isolated hadith and that Mālik accepts the *āthār* of the Companions as an indication of the *sunnah*, which are major contentions of ash-Shāfi’ī in that work against Mālik. I have also indicated in my treatment of Mālik’s biography the attitude that the biographical accounts of Mālik indicate that he had toward isolated and irregular *hadith*.

In some cases, no doubt, Mālik and other early *fuqahā’* who, like him, put great restrictions upon the use of isolated hadith regarded irregular isolated hadith that they rejected to have been fabricated. ‘Abu Yusuf, for example, refers to a statement of the Prophet, which he regards to be authentic:

⁵³³ Excerpts from ‘Umar Faruq Abd-Allah, *Malik’s Concept of ‘Amal in the Light of Maliki Legal Theory*, (unpublished PhD. Thesis), The University of Chicago, Illinois, 1978, p.170-183, 509-514. For an even more enlightening and detailed discussion and analysis of the various views regarding the importance, authority use of authentic single-chained or solitary (hadith *ahad*) among different Schools of Jurisprudence and scholars, see his more recent work in Umar F. Abd-Allah Waymann-Langraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period*, Brill, Leiden, The Netherlands, 2013, p.107-129.

Hadith shall be divulged from me in great numbers. Whatever comes down to you from me and is in accordance with the Qur'an is from me, but whatever comes down to you from me that contradicts [yukhalifu] the Qur'an is not from me.⁵³⁴

In a statement attributed to Malik in the “*Utbiyah*”⁵³⁵, he is said to have regarded a certain hadith to have been fabricated because of its irregularity.⁵³⁶

Nevertheless, there are numerous cases in which Malik, ‘Abu Yusuf, and Ibn al-Qasim clearly regard the isolated hadith they reject to be defective for reasons other than having been fabricated. It is significant, for example, that the majority of the isolated hadith in “*Ikhtilaf Malik*” upon which ash-Shafi’i builds his arguments and which Malik had rejected are hadith which Malik himself had transmitted in the Muwatta with impeccable *‘isnads*. Hence, it appears that it is because of the meanings and legal implications of these hadith that Malik regards them to be irregular and not because he questions their formal authenticity.

Many of the expressions that Malik and Ibn al-Qasim use in speaking of the irregular, isolated hadith they reject indicate that it is not necessarily their authenticity which they question. Malik says, for example, “I do not know what the reality [*haqiqah*] of this hadith is.”⁵³⁷ Ibn al-Qasim comments regarding an irregular hadith, “We do not know what the proper explanation [*tafsir*] of it is.”⁵³⁸ Malik says, “This hadith has come down to us, but so has that [namely, *‘amal*] which indicates its weakness [*da’f*],”⁵³⁹ or he says, “This hadith has come down to us, but *‘amal* is not in accordance with it.”⁵⁴⁰ In the context of one of the most elaborate statements in the *Mudawwanah* about isolated, irregular hadith, Ibn al-Qasim explains that many such hadith are “not regarded to have been fabricated but also not regarded to be suitable for being put into practice” [*“fa-baqiya ghair mukadhdhab bihi wa la ma’mul bihi”*].⁵⁴¹

⁵³⁴ Abu Yusuf, p. 24 – 25.

⁵³⁵ As I have pointed out, some prominent early Maliki *fuqaha’* have denied the authenticity of much of the contents of the “*Utbiyah*”; see pp. 118-119.

⁵³⁶ Cited by ash-Shatibi, *Al-Muwafaqat*, 3:66 – 67.

⁵³⁷ *Mudawwanah*, 1:5 (8).

⁵³⁸ *Ibid.*, 2:151 (28).

⁵³⁹ *Ibid.*, 1:98 (19).

⁵⁴⁰ *Ibid.*, 1:164.

⁵⁴¹ *Ibid.*, 2:151-152 (28).

It is reported that the famous Madīnah *faqīh* ibn al-Mājishūn (the report does not specify which one) was asked why they transmitted hadīth and then did not follow them. He answered, “So that it be known that we have rejected them while having knowledge of them.”⁵⁴² Similarly, Mālik is reported to have said that there were people of knowledge among the Successors who would transmit hadīth or receive them from others but who would then say, “We are not ignorant of them, but the ‘*amal*’ has been firmly established [*mada*] contrary to them.”⁵⁴³ It is reported that Malik’s teacher Rabi’ah used to say regarding ‘*amal*’ and isolated hadith, “One thousand [transmitting] from one thousand is preferable to me than one [transmitting] from one, for ‘one [transmitting] from one’ would tear [*yantazi’u*] the *sunnah* right out of our hands.”⁵⁴⁴ Similarly, it is reported that the Madinan *Qadi* Muhammad ibn ‘Abi Bakr ibn Hazm – who was the son of the famous Madinan *Faqih*, *Qadi*, and governor ‘Abu Bakr ibn Hazm and was *Qadi* of Madinah around 118/736 – used to hand down rulings consistent with Madinan ‘*amal*’ and contrary to some hadith. His brother ‘Abdallah, who was also one of Malik’s teachers, used to ask him why he had rejected a pertinent hadith. Malik reports that his brother would reply, “But what then of the ‘*amal*’”: Malik explains that he meant by this that upon which there was consensus in Madina.⁵⁴⁵

‘Abū Yūsuf’s *Siyar al-‘Awzā’ī* contains numerous instances of advice to rely on the well-known *sunnah* and avoid irregular [*shādhah*] hadith. He says once, for example:

Make the Qur’an and the well-known *sunnah* [*as-sunnah al-ma’rūfah*] your directing guide [*‘imāman qā’idan*]. Follow that and judge on the basis of it [*wa qis ‘alaihī*] whatever presents itself to you that has not been clarified for you in the Qur’an and the *sunnah*.⁵⁴⁶

And he says:

Beware of irregular [*shādhah*] hadīth and take care to follow [*wa ‘alaika bi...*] those hadīth which the community [*al-jamā‘ah*] is following, which the *fuqahā’* recognize [as

⁵⁴² ‘*Iyad*, 1:66.

⁵⁴³ ‘*Iyad*, 1:66.

⁵⁴⁴ *Ibid*.

⁵⁴⁵ *Waki’*, 1:176.

⁵⁴⁶ Abu Yusuf, p. 32.

valid] [*ya'rifuhū*], and which are in accordance with the Book and the *Sunnah*. Judge [*qis*] matters on that basis. As for that which is contrary to the Qur'an, it is not from the Prophet even if brought down by a transmission [*riwāyah*].⁵⁴⁷

Although in this example 'Abu Yusuf indicates that he regards certain types of irregular hadith not to be from the Prophet at all, he also indicates at times in *Siyar al-'Awzā'ī* that he does not question the authenticity of some irregular hadith but regards them to be misleading because they pertain to unique examples of the Prophet's behavior or commands or, for some other reason, are not normative. He accepts one hadith of al-'Awzā'ī as authentic but regards al-'Awzā'ī's conclusion to be very mistaken:

What the Messenger of God (ﷺ) has said [in this hadīth] is just as he has said, and knowledge of what al-'Awzā'ī has said pertaining to it has already reached us. But we regard it as irregular [*shādhah*], and hadith that are irregular are not to be followed.⁵⁴⁸

At several points in *Siyar al-'Awzā'ī* 'Abū Yūsuf stresses the great care that is required to draw proper conclusions from hadīth. Essentially, he repeats the following statement:

We have heard before what al-'Awzā'ī has told us about God's Messenger. But the hadith of God's Messenger have [diverse] meanings [*ma'an*], implications [*wujuh*], and interpretations, which only one whom God helps to that end can understand [*yafham*] and perceive [*yubsir*].⁵⁴⁹

Ibn Tumart sets forth some of the considerations that can make isolated hadith conjectural and irregular and, hence, unsuitable as the bases of legal reasoning until they are supported or clarified by reference to other sources of law such as, he points out, Madinan '*amal*'.⁵⁵⁰ Isolated hadith, he contends, are liable to additions, deletions, the loss of memory [on the part of the transmitter], errors and mistakes [*al-khat' wa 'l-ghalat*], oversights [*al-ghaflah*], lies [*al-kadhib*],

⁵⁴⁷ Abu Yusuf, pp. 30 – 31.

⁵⁴⁸ *Ibid.*, pp. 103-105; for similar examples of 'Abu Yusuf's drawing attention to the special consideration behind irregular hadith that make them unsuitable for further analogy, see *ibid.*, pp.85-87, 63-64, 134-135, 107-110.

⁵⁴⁹ 'Abu Yusuf, p. 38: cf. *ibid.*, pp.63-64, 107-110, 14-15.

⁵⁵⁰ Ibn Tumart, pp. 51-52.

the retraction [of one's opinion] [*ar-ruju'*], contradiction [with other hadith] [*at-ta'arud*], and interpolation [*at-tahrif*].⁵⁵¹

Ash-Shatibi holds that authentic statements that have been isolated from their contexts are ambiguous by nature, whether they be isolated hadith or something else. Ambiguous statements, however, are essentially of two types, he believes: 1) those that are ambiguous in essence [*al-mutashabih al-haqiqi*] and 2) those that are only incidentally ambiguous [*al-mutashabih al-'idafi*]. The ambiguity of the first type, he believes, can never be removed; an example that he gives of a statement of that type are the Arabic letters like "*Alif, Lam, Mim*"⁵⁵² that come at the beginning of some chapters of the Qur'an. But the ambiguity of the second type can be removed once the statement is placed in its proper context in terms of the facts or the definitive precepts and principles that pertain to it. Ash-Shatibi believes that most ambiguous statements in the textual sources of Islamic law are of this second type.⁵⁵³

Ambiguous statements are open to numerous interpretations, which are often mutually contradictory and contradict other sources and principles of law as well. Once placed in proper content, however, this ambiguity is removed, and the intended interpretation becomes clear. Hence, according to ash-Shatibi, it is the duty of the *mujtahid* first to find the proper context in which an ambiguous statement belongs before beginning to draw conclusions from it. The *mujtahid* must find the specification [*mukhassis*] that removes the ambiguity of the general [*'amm*] statement. He must discover the qualifier [*muqayyid*] that limits the unqualified [*mutlaq*] statement. He must find the correct interpretation [*al-mu'awwil*] for the obvious [*zahir*] statement. He must find the clarification [*mubayyin*] that elucidates the intended meaning of a clearly ambiguous [*mujmal*] statement, and, finally, the *mujtahid* must find the abrogation [*anasikh*] that pertains to the statement that was abrogated [*mansukh*].⁵⁵⁴

Conclusions must not, however, be drawn on the basis of an isolated statement until it has been clarified in this manner and its ambiguity has been removed. Ash-Shatibi holds that one of the most fundamental characteristics of the Islamic heresies, whether those of extreme literalists or

⁵⁵¹ *Ibid.*, p. 48.

⁵⁵² Qur'an, 2:1, 3:1, 29:1, 30:1, 31:1, 32:1.

⁵⁵³ Ash-Shatibi, *Al-Muwafaqat*, 3:85-93.

⁵⁵⁴ Ash-Shatibi, *Al-Muwafaqat*, 3:98, 76.

extreme esoteric, has been that they base their arguments on ambiguous statements taken out of their proper contexts, in the state in which they lead to confusion and contradiction.⁵⁵⁵ Like other Malikis, ash-Shatibi holds that one of the surest criteria against which to remove the ambiguity of isolated legal statements and to place them in their proper context is that of '*amal*:

...for whenever a *mujtahid* contemplates a legal statement pertaining to a matter, he is required to look into [*bahth*] many things, without which it would be unsound to put the statement into practice. Consideration of the '*amal* [lit., '*a'mal*] of the early generations [*al-mutaqaddimin*] removes these ambiguities from the statement decisively. It renders distinct that which is abrogating from that which has been abrogated; it provides a clarification [*mubayyin*] for that which is ambiguous [*mujmal*], and so forth. Thus, it is for this reason that Malik ibn 'Anas and those who hold to his opinion have relied upon it.⁵⁵⁶

Malik's Use of Isolated Hadith by Reference to Other Sources of Law

The very notion of irregularity in isolated hadith implies that those who regard them to be irregular have a criterion established by other sources and principles of law by which they determine what is regular (i.e. what is in conformity with that criterion) and what is irregular. 'Abu Yusuf indicates in the citations I have just given that the Kufan criterion was constituted by the Qur'an, the well-known *Sunnah*, and those hadith that are recognized as valid by the *Fuqaha*'. Several of the citations I have just given indicate that Malik and other prominent *Madinan Fuqaha*' of his generation and before him looked to '*amal* as a criterion. Later Malik legal theorists hold that isolated hadith can provide definitive knowledge once they are supported by other sources and principles of law.⁵⁵⁷ In fact when an isolated hadith is supported by '*amal*, as 'Abu Zahrah points out, Malik is no longer regard it to be isolated.⁵⁵⁸

The most explicit statement that I have found in the *Muwatta'* or *Mudawwanah* pertaining to Malik's use of '*amal* as a criterion against which to evaluate isolated hadith is the following

⁵⁵⁵ *Ibid.*, 3:76, 352, 90-91.

⁵⁵⁶ *Ibid.*, 3:76.

⁵⁵⁷ See al-Qarafi, 1:33; Ibn al-Hajib, p.72; Ibn Tumart, pp.51-52; 'Iyad, 1:71; 'Abu Zahrah, Malik, p.303.

⁵⁵⁸ Abu Zahrah, Malik, p.305.

statement by Ibn al-Qasim. ‘Asad ibn al-Furat has been questioning him about an *‘athar* that reports that ‘Aisha apparently acted once in the capacity of a guardian [*wali*] in the marriage of one of her kinsmen when the girl’s father... the legal *wali*... was out of Madinah travelling. Ibn al-Qasim does not doubt the authenticity of the *‘athar* but tells ‘Asad, “We do not know what the explanation [*tafsir*] of it is, but believe that she appointed [*wakkalat*] someone else to act as her representative in contracting the marriage.” But even so, ‘Asad returns, the marriage would be irregular [*fasid*] according to Malik. Ibn al-Qasim replies:

This has come down [to us], and if this hadith had been accompanied by *‘amal* such that that [practice] would have reached those whom we met during our lifetimes and from whom we received [our knowledge] and those whom they had met during their lifetimes, it would indeed be correct [*haqq*] to follow it. But it is only like other hadith that have not been accompanied by *‘amal*.

[A hadith] has been transmitted from the Prophet (SAW), [for example], regarding the use of scent during the rites of pilgrimage, and also among that which has come down from him (SAW) are [the words], “the fornicator ceases to be a believer when he fornicates” and “...when he commits theft”, but God has revealed [in the Qur’an] the punishment of the fornicator and the cutting off [of the thief’s hand] on the basis of [his being] a believer. Other things have been transmitted from other Companions as well that have no support [*lam yastanid*] and are not strong [*lam yaqwi*] and regarding which the *‘amal* that was established is contrary. [Indeed], the generality of the people and of the Companions followed something contrary to them.

[Hadith such as these] remained [in the state of being] neither rejected as fabricated [*ghair mukadhdhab bihi*] or put into practice. Rather *‘amal* was established in accordance with those [hadith] that were accompanied by the practices [*‘amal*] [of the earlier generations] and which were followed by the Companions of the Prophet, who were his followers; and similarly the Successors followed them likewise without regarding that which had come down and been transmitted to have been fabricated or rejecting them outright [*“min ghair takdhib wa la radd lima ja’a wa ruwiya”*].

Thus, that is passed over which has been passed over in *‘amal* [*“fa-yutraku ma turika ‘l-‘amal bihi”*], and it is not regarded to have been fabricated [*“wa la yukadhdhabu bihi”*]. But *‘amal* is practiced in accordance with that which has been practiced as *‘amal*, and it is regarded to be certainly authentic [*wa yusaddaqu bihi*].

[In this matter we have been discussing], the *‘amal* which is firmly established and is accompanied by the practices [*‘amal*] [of others] is the Prophet’s statement (SAW), “A woman shall only be married through a guardian” and the statement of ‘Umar ibn al-Khattab, “A woman shall only be married through a guardian.” Furthermore, ‘Umar separated a husband and wife who had been married without a guardian.⁵⁵⁹

According to Maliki legal theorists, Malik also rejects isolated hadith by reference to sources of law other than *‘amal* and by reference to definitively established precepts and principles of law. An illustration sometimes cited of this is Malik’s rejection of an irregular, isolated hadith, which is regarded as formally authentic, that stipulates that one should wash a pot from which a dog takes a drink seven times before using it again and discard the contents. Ibn al-Qasim says that he asked Malik about this hadith, and Malik replied, “This hadith has come down to us, but I do not know what the reality [*haqiqah*] of it is.” Ibn al-Qasim indicates that Malik regarded the domestic dog to be an exception on the basis of *istihsan* to other canines [*siba’*] that live in the wild, because such dogs live in man’s company and are like members of the household [*“ka’annahu min ‘ahl al-bait”*]. Thus, it would be severe to expect people to wash their pots seven times every time their dog takes a drink from them. Ibn al-Qasim continues to say that Malik also held that people should still consume the cooking butter [*samn*] or milk that might have been in the pot, even though their dog have eaten some of it while they were not attending. Malik would say, “I regard it as preposterous [*‘aziman*] that one throw out to a dog sustenance that God has provided merely because the dog has licked it.”⁵⁶⁰ Ibn al-Qasim had added earlier that Malik had once been asked how he could hold this opinion concerning dogs and contrary opinions concerning other types of animals. Malik would reply, “Each thing has its own standpoint [from which it must be considered]” [*“wa li-kulli shai’ wajh”*].⁵⁶¹

⁵⁵⁹*Mudawwanah*, 2:151-152 (28).

⁵⁶⁰*Mudawwanah*, 1:5.

⁵⁶¹*Ibid.*, 1:4.

According to the famous Andalusian Maliki legal theorist ‘Abu Bakr ibn al-‘Arabi,⁵⁶² this opinion regarding the domestic dog is an example of Malik giving priority to *qiyas* based upon definitive precepts of law over an isolated hadith that is not supported by other definitive precepts or principles. The hadith about washing the pot seven times and discarding its contents, ibn al-‘Arabi points out, is contrary to the Qur’anic verse that declares the catch of hunting dogs to be permissible for eating: “...and eat of the catch that they apprehend for you.”⁵⁶³ For hunting dogs seize the catch in their mouths and sometimes carry it in their mouths for a considerable time before the hunter gets it from them.⁵⁶⁴

‘Abu Bakr ibn al-‘Arabi also discusses the question of when it is permissible to accept an isolated hadith that conflicts with a definitive precept [*qa’idah*] of Islamic law. ‘Abu Hanifah, he states, holds that it is not permissible to put such hadith into practice, while ash-Shafi’i holds that one is required to put them into practice. As for Malik, Ibn al-‘Arabi claims, he does not take either position. Rather Malik holds that the precept indicated by such a hadith may be regarded as valid despite the fact there is no other precept to support it; however, the contrary isolated hadith will be rejected.⁵⁶⁵ It should be pointed out that ‘Abu Zahrah believes, on the basis of statements of al-Karkhi and ‘Isa ibn ‘Aban regarding ‘Abu Hanifah’s legal theory, that ‘Abu Bakr ibn al-‘Arabi is mistaken about ‘Abu Hanifah’s method of reasoning in this matter and that there is no essential difference between ‘Abu Hanifah and Malik on it.⁵⁶⁶

Hadīth in the Absence of Corresponding Types of ‘Amal

⁵⁶² ‘Abu Bakr Muhammad ibn ‘Abd-Allah ibn Muhammad Ibn Al-‘Arabi (468-543/1076-1148) was one of the greatest Maliki *fuqaha’* and legal theorists. He was a *hafiz* of hadith and had extensive knowledge of all Islamic religious sciences and Arabic literature. He became the Qadi of his native Seville. Ibn al-‘Arabi wrote numerous valuable works on legal theory, fiqh, hadith, Qur’anic commentary, literature, and history. He died in Morocco near Fez, where he was buried. Many of his works are still available. Zirikli, 7:106-107.

⁵⁶³ Qur’an, 5:4

⁵⁶⁴ Cited by ash-Shatibi, Al-Muwafaqat, 3:24.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ Abu Zahrah, Malik, p. 303, note 1.

In his discussion of the relationship between *‘Amal* and hadīth, ash-Shātibī also discusses types of hadīth which appear to have certain legal implications yet regarding which there was no corresponding *‘amal* which either supported or explicitly contradicted those implications. He also places in this category hadīth which have certain implications but regarding which only isolated persons are known to have put those implications into practice in the first generations but for which there was no widespread *‘amal*. Ash-Shātibī’s position, which I will discuss in more detail shortly, is that such apparent legal implications in authentically transmitted hadīth cannot generally be made a part of *‘amal* in later generations if they were not a part of the widespread *‘amal* in the first generations.⁵⁶⁷

Al-Qādī ‘Iyād holds a different position than ash-Shātibī on this matter. He holds that whenever a hadīth is authentic – even if it is an isolated hadīth and regardless of whether it was transmitted by Madinan or non-Madinan *muhaddith*’s – and there is no corresponding *‘amal* either supporting it or contradicting it, then one is obliged to follow the legal implications of that hadīth. ‘Iyād defends the Mālikī school against the criticisms of those who, according to ‘Iyād, have held that Mālik and his school refused to follow the implications of hadīth unless there was clear support for those implications in the *‘amal* of Madinah. ‘Iyād contends that, on the contrary, the Mālikī School only rejects hadīth when they are contradictory to *‘amal* but not when there is simply no corresponding *‘amal* at all.⁵⁶⁸

Ash-Shātibī contends, on the other hand, that the mere absence of *‘amal* regarding the apparent legal implications of hadīth constitutes itself a contradictory *‘amal* to those implications. Ash-Shātibī bases this position on the premise that the first generations of Islam – with whom the establishment and perpetuation of *‘amal* began – had comprehensive knowledge of the practical demands which Islamic law made of them and that they were faithful in putting these demands into practice, i.e. making them *‘amal*. The Prophet and the Qur’an had addressed them in their own idiom and in the context of the circumstances in which they were living; hence, they understood clearly, according to ash-Shātibī, the semantic implications of the directives and teachings they were given. Therefore, ash-Shātibī continues, when an authentic legal text appears to be implying a certain practice which the Companions and the first generations would

⁵⁶⁷ Ash-Shatibi, *Al-Muwafaqat*, 3:64-76.

⁵⁶⁸ ‘Iyad, 1:71-72.

have been likely to have put into practice had they understood it to be demanded of them and, yet, they did not put those implications into practice, it follows that something else was intended by the semantics of that text and it would not be sound to make an ‘*amal*’ of those implications at a later time.⁵⁶⁹ Ash-Shātibī’s use of ‘*amal*’ in this manner is in keeping with the position of Ibn al-Qasim in the *Mudawwanah* in which he stresses not just that hadīth not be contrary to ‘*amal*’ but, in fact, that they be accompanied by ‘*amal*’.⁵⁷⁰

Ash-Shātibī continues to point out, however, that this restriction of the legal implications of texts to the ‘*amal*’ of the first generations of Muslims applies only to those types of behavior which the first generations would have been able or likely to perform in the context of the circumstances in which they were living. Thus, he divides the types of behavior which the Companions and the first generations of Muslims did not do into two categories. There were, first of all, those sorts of things that were *mazinnat* ‘*amal*’ – i.e. the sorts of things which the first generations would have been expected to have put into ‘*amal*’ had they regarded them to be valid parts of Islamic law and something which Islam intended that they do. It is only legal implications in texts which fall into this category which one does not put into practice in a later age if they had not been part of the ‘*amal*’ of the first generations. The second category is that of types of behavior, legal procedures, and so forth that were not *mazinnat* ‘*amal*’ – things which were likely to have been done – within the context of the circumstances of the age in which these first generations were living. Matters which fall into this category, according to ash-Shātibī, must be evaluated in terms of the legal principle of *al-masālih al-mursalah*. If they are found to be in keeping with the dictates and ultimate purposes of Islamic law, they are desirable, and, if they are found to be contrary to the dictates and ultimate purpose of Islamic law, they are unacceptable.⁵⁷¹

I referred earlier to a statement attributed to Mālik according to which he rejected the practice of performing prostrations of gratitude (to God) [*Sajdat ash-Shukr*] when one meets with some particular good fortune. The observation was made to Mālik that it had been said that ‘Abu Bakr

⁵⁶⁹ Ash-Shatibi, *Al-Muwafaqat*, 3:73.

⁵⁷⁰ See above pages

⁵⁷¹ Ash-Shatibi, *Al-Muwafaqat*, 3:74

performed this *Sajdat ash-Shukr* after his armies achieved a great victory. Mālik denies the authenticity of the report and is reported to have replied,

It is a type of misguidance that one hears something and then says, “This is something regarding which we have heard nothing to the contrary.” Many victories came to the Messenger of God, [may God bless him and give him peace, and to the Muslims after him]. Did you ever hear of a single one of them prostrating himself?

When something like this comes down to you that has been part of the experience of the people and took place right in their midst and yet you have heard nothing about it from them, then let that be a sufficient indication for you. For if it had taken place, it would have been mentioned, because it is part of the common experience of the people [*‘amr an-nās*] which took place among them. So have you heard that anyone prostrated himself? Well, then, that is the *‘ijmā’*. When something comes down to you that you do not recognize, put it aside.

Ash-Shātibī comments after citing this report that it indicates that one should rely upon the general *‘amal* of the many and not follow the implications of reports of rarities and unusual actions which have been transmitted [*“qalā’il mā nuqila wa nawādir al-‘af’āl”*] when the general and widespread *‘amal* is contrary to them.

Ash-Shātibī cites and discusses several examples of hadīth and *āthār* with legal implications that he regards to be invalid because of the absence of a significantly widespread *‘amal* among the first generations of Muslims in keeping with those implications. Among these examples, he refers to hadīth which speak of the excellence of ‘Alī ibn Abī Tālib, the mutual affection between him and the Prophet, and so forth and are among the proofs which the *shī’ah* have used to indicate that the Prophet intended the political leadership [*al-‘imāmah*] of the community to fall to his nephew ‘Alī and the descendants of ‘Alī and Fātimah, the Prophet’s daughter, in succeeding generations. Ash-Shātibī holds that the absence of *‘amal* among the Companions in keeping with such implications and the general consensus of them regarding the caliphates of ‘Abū Bakr

and 'Umar are sufficient indications that, even if such texts are authentic, they did not have such political implications.⁵⁷²

⁵⁷² Ash-Shatibi, *Al-Muwafaqat*, 3:71, 64-76.

GLOSSARY OF TERMS ⁵⁷³

Āhād or solitary hadiths: A solitary hadith is a report narrated on the authority of the Prophet (ﷺ) by one or more individuals but whose chain of transmission does not fulfill the requirements of *tawātur*.

Ahādith(pl. of hadith): Reported and authenticated traditions about what the Prophet (ﷺ) said, did, or approved.

Ahkām(pl. of hukm): Rulings, values, prescriptions, commandments, judgments, or laws stemming from Islamic law.

Al-fiqh: Islamic law and jurisprudence. It comprises two general sections that are based on different and opposed methodological approaches: *al-ʿibādāt*, worship, devotional acts, where only what is prescribed is permitted (in the view of the many scholars); and *al-muʿāmalāt*, social affairs, where everything is permitted except what is explicitly forbidden.

Al-Masālih al-Mursalah, or unrestricted or unstated good (sometimes referred to also as public interest): Interests or benefits which are not explicitly identified by any text in the Qurʾan or the *Sunnah* but which are generally agreed upon based on circumstances which arise in human society. Examples of unrestricted interests include the paving of roads, the setting up of administrative offices to handle public needs, the use of traffic signals, the construction of sewers and waste disposal facilities, etc.

Al-Shariʾah: There is not a single definition of *Shariʾah*. Scholars have generally circumscribed its meaning from the standpoint of their own sphere of specialization. Starting from the broadest to the most restricted exceptions, there are the following definitions:

⁵⁷³ The definitions in this glossary of terms are drawn for the most part from the following sources: Koutoub Moustapha Sano, *Muʿjam Mustalahāt Usūl al-Fiqh, ʿArabī-Inkilīzī* (Concordance of Jurisprudence Fundamentals Terminology), Damascus: Dār al-Fikr, 2000; Qalaji, Muhammad Rawwas, *et. al., Muʿjam Lughah al-Fuqahāʾ*, English-French-Arabic, Beirut: Dār al-Nafāʾis, 1996; and Deeb al-Khudrawi, *A Dictionary of Islamic Terms, Arabic-English*, Damascus-Beirut: Dār al-Yamāmah, 1995.

1. *Al-Shari'ah*, on the basis of the root of the word, means “the way” (“the path leading to the source”) and outlines a global conception of creation, existence, death, and the way of life it entails, stemming from a normative reading and an understanding of scriptural sources. It determines “how to be a Muslim.”
2. *Al-Shari'ah*, for *usuliyyūn* and jurists, is the corpus of general principles of Islamic law extracted from its two fundamental primary sources (the Qur'an and the Sunnah). *Al-Shari'ah* also uses other secondary sources - mainly *al-ijma'* and *al-qiyas* but also *al-istihsān*, *al-istislāh* or *al-maslahah*, *al-istishāb*, *al-'urf*, etc.

Asl (pl. *usūl*): Root, origin, source or foundation, principles.

Zanni (or *dhanni*): Not categorical, presumptive, leaving room for speculation or conjecture about its origin/authenticity or allowing scope to interpretation as to its meaning or implication.

Faqīh (pl. *fuqahā'*): Literally, “one who understands deeply.” Generally defines the jurist who masters the sciences of law and jurisprudence, but this title is sometimes used for scholars of very diverse abilities. By referring to etymology, one may apply this term to an individual possessing great religious knowledge, without thinking of a particular field of specialization. In the language of specialists, the term refers to someone who knows legal matters without necessarily being competent to develop and formulate specific and/or new legal rulings. His knowledge may relate to one particular school or to several, the views expressed about a given legal issue, the points on which scholars disagree; he may also express one or several already formulated legal rulings but this is generally where his competence stops. The *mujtahid* or *Mufti* are generally acknowledged *fuqahā'*, but a *faqīh* is not necessarily a *mujtahid* or a *Mufti*.

Fath al-Dharā'i: The opposite of *sadd al-dharā'i'*. This term refers to the process of “opening up paths” which, despite some potential to cause harm, has a greater potential to lead to benefit.

Fatwa (pl. *fatāwā*): Specific legal ruling sensitive to context. An answer or verdict to religious question for a particular time, place or person. It can be a mere reminder of a prescription explicitly stated by the sources or a scholar's determination on the basis of a text that is not explicit or in the case of a specific situation for which there is no scriptural source.

Ijma': Consensus of opinion, in the sense of unanimous or majority opinion.

Ijtihād: Literally, “effort”; independent reasoning. It has become a technical term meaning the effort made by a jurist, either by extracting a law or a ruling from scriptural sources that are not explicit or by formulating a specific legal opinion in the absence of texts of references. It is the effort exerted by a suitably qualified *fiqh* scholar to arrive at an accurate conceptualization of the divine will based on Muslim legal sources (the Qur’an, the Hadith, analogical deduction and consensus) and the means by which to apply this will in a given age and under given circumstances; as such, *ijtihad* is the effort exerted by such a scholar to derive a legal ruling from Muslim legal sources, and to reach certainty on questions of an ambiguous nature.

‘Illah: The underlying legal cause of a *hukm*, its *ratio decidendi*, on the basis of which the accompanying *hukm* is extended to other cases. It is the actual *cause* of a specific ruling. It makes it possible to understand a ruling through its cause and thus opens the way to elaborating other rulings through analogy or extension.

Istihsān: Judging something as being good; it is, in fact, the application of “legal/juristic preference”. *Istihsān* or juristic preference or discretion, is a decision, in the process of arriving at a legal decision, to refrain from applying to a given situation the same ruling which has been applied to analogous situations in favor of another ruling which is more in keeping with the intents of the Law. In other words, juristic preference involves giving human interests and the intents of the Law priority over the results of analogical deduction (*qiyās*) or other precepts and principles due to unique or special circumstances.

Istishāb: Presumption of continuity of what was previously prescribed; a judgment or ruling to the effect that a state of affairs which obtained at an earlier time continues to obtain now in the absence of evidence to the contrary.

Istislāh: Consideration linked to general interest. *Istislāh* or reasoning based on unrestricted or textually unstated interests. The practice of issuing a legal ruling concerning a case which is not mentioned explicitly in any authoritative Islamic legal text and on which there is no consensus; based on consideration for unrestricted interests (see *al-masālih al-mursalah*).

Madhhab (pl. *madhāhib*): School of Legal Theory, School of juristic thought and methodology, School of Islamic law.

Makrūh: Abhorred, tolerated, discouraged.

Mandūb (or *mustahab*): Recommended or encouraged.

Maqāsid (sing. *Maqsad*): Literally, 'intent', 'aims' or 'purposes'. This term is frequently used alone to refer to the intents of Islamic law in general, that is, *maqāsid al-sharī'ah*; objectives or goals of Islamic teachings.

Maslahah: Consideration of public interest and the common good.

Mubāh: Permitted or allowed; neither encouraged nor discouraged. Also a synonym for *ja'iz*.

Mufti: Literally, one who decides on a point of law. Some scholars have often used the terms *mujtahid* and *Mufti* interchangeably. The link indeed seems natural since the practice of *ijtihād* is necessary for the formulation of a *fatwa*. A *Mufti* is therefore someone who formulates specific legal opinions on the basis of texts that are not explicit or in the absence of specific texts. However, scholars have highlighted three specificities in order to denote the differences in denominations and functions. Firstly, the *Mufti* is clearly at the disposal of the community or of individuals; his function is to *answer* questions and have these answers direct his reflection. This is not the case for the *mujtahid* who is not necessarily asked questions and can work independently. Secondly, the *Mufti* must know the people and society he lives among since his role causes him to interact more directly with his environment; this is also required of the *mujtahid* but less expressly. Finally, some have noted a mere institutional difference: the *Mufti* is a *mujtahid* who has been employed by the state or who serves a specific institution to formulate legal rulings and direct the administration of affairs. The *Mufti* would thus simply be a *mujtahid* who has become a civil servant.

The same distinctions exist among scholars regarding the differences between the *Mufti mutlaq* (who treats general cases) and the *Mufti muqayyad* (who is a specialist in a particular field). Within Islamic legal schools, a *mufti* is considered the pinnacle in the hierarchy of scholars

because of the advanced training required out of the individual aspiring to be a mufti. Originally, muftis were private individuals who gave *fatwas* informally, regulated their own activities, and determined their own standards of the fatwa institution.

Mujtahid: Someone who engages in *ijtihad*, or independent reasoning; a scholar who works on scriptural sources to infer or extract judgements and legal rulings. He is recognized as competent to practice *ijtihad* (same Arabic root, *ja-ha-da*) on texts that are not explicit or in the absence of specific texts. Numerous qualities are required to reach this level of competence. (1) Knowledge of the Arabic language (2) Knowledge of the Qur'an and hadith sciences (3) Deep knowledge of the objectives (*maqāsid*) of the *shari'ah* (4) Knowledge of the issues on which a consensus exists, which makes it necessary to know the substance of the works on secondary issues (*furū'*) (5) Knowledge of the principle of analogical reasoning (*qiyās*) and its methodology (6) Knowledge of the historical, social, and political contexts; that is, the situation of his society (*ahwāl an-nās*) (7) Recognition of his competence, honesty, reliability, and uprightness.

Scholars have distinguished two types of *mujtahid* for whom the required competence criteria differ:

1. ***Al-mujtahid al-mutlaq*** (absolute): Extracts legal rulings and opinions directly from the sources and beyond all specific school criteria. His recognized knowledge of texts and methodological principles enables him to formulate views that do not necessarily refer to schools that teach Islamic law and their rules.
2. ***Al-mujtahid al-muqayyad*** (limited): Extracts prescriptions within the framework of a specific juridical school. The conditions required for the latter are, of course, less demanding; they also include the knowledge of the rules of deduction linked to the school that teaches Islamic law to which he belongs or refers.

Qat'i: Clear-cut, explicit, or definite, leaving no scope for speculation (*zann*) as to its interpretation (*dilalah*) or authenticity (*thubut* or *wurud*) i.e. chains of transmission.

Qiyās, or analogical deduction: The practice of basing a new legal ruling on a previous ruling concerning a similar case, given the similarity between the two cases with respect to their underlying basis or cause (*'illah*).

Rukhsah: License or concession. Mitigation in the practice or implementation of prescriptions due, for instance, to age, illness, income, social conditions, or other factors.

Sadd al-Dharāi’: Literally “blocking the routes/means”. The prohibition of evasive legal devices, or of anything which has the potential of leading to that which is forbidden.

Usūlī (pl. usūliyyūn): A scholar knowledgeable about the fundamental principles of Islamic law. He works with the Qur’an and *Sunnah* and he must master the instruments of Islamic law and know the principles and methodology by means of which the rules of law and jurisprudence are inferred and extracted from their sources. He studies rules of interpretation, the fields related to obligation and prohibition, as well as rules about general orientation. The principles of implementation of *ijtihād*, ‘*ijmā’*’, or *qiyās* also fall within his province although this does not mean he is competent to implement them. His knowledge is essentially theoretical. An *usuli* is not necessarily a *mujtahid* or a *Mufti*, since his knowledge merely enables him to identify the instruments of extraction and deduction without being competent to make use of them. A *mujtahid* or a *Mufti* necessarily masters the field of knowledge and competence of an *usūl* scholar

Usūl al-fiqh: The fundamental principles of Islamic Law. *Usūl al-fiqh* expounds principles and methodologies by means of which the rules of law and jurisprudence are inferred and extracted from their sources. It involves the study and formulation of rules of interpretation, obligation, prohibition, and global principles, *ijtihād* (*ijmā’*’, *qiyās*).

Wājib: Obligation; often used as a synonym for *Fard* except by Hanafi jurists.

Zannī: Presumptive or speculative. An adjective describing a term, phrase, or statement which most likely conveys a particular meaning or implication (*dilalah*), with the possibility that it might be understood in some other way as well. In his definition of the term ‘speculative evidence’ (*al-dalīl al-zannī*), Mustafa Sano explains that evidence which is speculative is that which yields reasonable, but not conclusive, certainty, and that the speculative nature of a given piece of textual evidence will be attributable either to its chain of transmission (*sanad*), its content (*matn*), or both. Textual evidence which is deemed speculative based on its chain of transmission

(*al-wurud/thubut*) might include, for example, a hadith passed down on the authority of the Prophet (ﷺ) by one, two or even more individuals but which does not meet the requirements of *tawātur*. Any report or account which does not meet the standards for *tawātur* is deemed to be speculative (*zanni*) rather than conclusive. Classification of textual evidence as speculative based on its content (*matn*) arises from the fact that it is subject to more than one interpretation. Most Qur’anic verses are classified as speculative on this basis despite the fact that their chain of transmission is of unquestionable reliability. All hadiths are likewise speculative with respect to their *matn*, including those which meet the criteria for *tawātur*. As for texts which are classified as speculative in terms of both their *matn* and their *sanad*, they include all hadiths with the exception of those which are *mutawātirah* as well as all evidence based on independent reasoning or interpretation, including the processes of *qiyās*, *istihsān*, *sadd al-dharā’i’*, and the like.

AFTERWORD

This course's introduction to the various methodologies of *Usul al-Fiqh* and *Maqasid al-Shari'ah* has described some of the thinking, arguments, and the organisation of evidence used by different jurists and their Schools of Jurisprudence. We hope that your brief exposure to this field has enabled you to avoid premature and simplistic dismissals of opinions, as well as prejudice against scholars who voice opinions that many of us may not have the intellectual qualifications to fairly assess. Many "controversial" topics are simply topics whose arguments and evidences are too sophisticated, intricate and complex for the lay person to sufficiently appreciate.

In our Preface, we mentioned that there are a number of critical questions and issues that many of those involved in sharing the message of Islam with Muslim youth and people of other faiths find difficult to tackle. Many answers which Muslims believe belong to the true teachings of Islam appear difficult to reasonably explain. They are privately disturbing to a clear conscience, and publically unpalatable and embarrassing to defend. Some answers that are cogent, valuable and easy to explain are presented by "unknown" scholars or are "minority" positions and are therefore often unknown to most people or generally ignored. It sometimes seems difficult to be both rational and sincere to one's religious heritage; both cogent and traditional; both faithful to the position of the majority of scholars and also faithful to one's conscience. This has created an awkward and embarrassing situation for many Muslims who need to explain Islam in cogent, reasonable and values-based terms to a more critical and curious global society.

A major challenge to the intellectual exploration of topics among Muslim scholars is the lack of readiness on the part of contemporary Muslim audiences to respect the credibility of past scholars that held a "minority" opinion, especially if a more popular scholar has described it as "weak" or "wrong". Often, "minority" opinions were pronounced as "weak" due to a lack of appreciation of the different set of principles or tools used to derive them, or because the scholars who formed them were working within a different set of realities from the scholar making the pronouncement. Considering the fact that opinions are usually developed within and for certain contexts, it is probably more reasonable to speak of certain opinions as "less relevant" or "more relevant" rather than "weaker" or "stronger".

It is also important to assess the arguments in support of a verdict on their own merit rather than to associate them with unrelated issues. Sometimes, a scholar who holds a valid opinion on one issue is unpopular in certain quarters because of his views on another issue unrelated to the question at hand. On other occasions, discussion or debate on a subject was silenced by the claim (or “sword”) of “consensus” (*ijma'*), and re-opening such debates was considered disrespectful and disloyal to tradition.

Criteria for the “most relevant” opinion

Thinkers may do well to ask: Should the criteria for the most relevant opinion, or for truth in general, be based on whether or not it is held by a “majority” at a given place and time? Should the criteria be how well-known the scholar is, irrespective of the veracity of his or her arguments? Should the criteria for what is “most relevant” to a particular society be based on the popularity of a scholar’s view, even though that scholar did not live to see the present context where the same view is to be administered? Should the criteria be based on the political or philosophical views of a scholar rather than his/her proofs for the issue in question? Should the criteria be how early or late a scholar lived in Islamic history? Do later scholars who studied from the earlier ones have opinions that may be relevant? In some fields, are some former majority opinions now only held by a minority of lay persons, and no more respected by its experts? Were some majority opinions of today not once held by only a minority of people?

While we may easily agree that the best criterion is to assess the evidence presented, the challenge is: who would be qualified enough to assess? Many young Muslims who ask questions about Islam are similar to patients who know they should go to a doctor or hospital, but who do not know the difference between ordinary doctors (General Practitioners) and specialists. Somewould gladly accept the prescription of a doctor irrespective of whether that doctor is a Gynecologist, a Dentist, Pediatrician or Psychiatrist. One importance of understanding even the basics of *Usul al-Fiqh* and *Maqasid al-Shari'ah* is that it allows the “patient” or lay person to quickly know when he or she is dealing with a specialist-scholar in the area of jurisprudence and its principles, or with a “General Practitioner”. Knowing the difference between the two empowers a patient to know who to seek more in-depth knowledge from.

Types of specialists

Within the Islamic Sciences (*Ulum al-Deen*) there are many specialists. The most important of these are the *Mufasssirun* (who specialize in the sciences and commentaries of the Qur'an), *Muhaddithun* (who specialize in the Sciences, authenticity and commentaries of Hadith literature), and the *Fuqaha* (who specialize in law and jurisprudence). Less well-known but no less important are the *Usuliyyun*, *Mujtahidun* and *Muftis*. The *Usuliyyun* are concerned with the fundamental principles, protocols, procedures and methodologies of using evidence and proofs (*adillah*) from the Qur'an, Sunnah, *Ijma'*, *Qiyas*, *Maslahah*, *Sadd al-Dhara'i*, and the other tools and principles of *ijtihad*. Those qualified to use the tools of the *Usuliyyun* to derive rulings representative of the Prophet (ﷺ) are known as *Mujtahidun*. A *Mujtahid* who is knowledgeable of his local priorities and realities is usually qualified to become a *Mufti*. These are jurists responsible for performing *ijtihad* for their specific contexts and issuing religious verdicts (*fatwas*) accordingly.

Reactionary Reasoning

A *Mufti* whose task is to come up with locally relevant opinions is expected to use a number of tools to formulate his positions. These tools DO NOT include reactionary reasoning. This form of thinking attempts to defend or promote Islam by constructing Islamic ideals on the basis of resistance or opposition to the ideals presented by non-Muslims. Reactionary reasoning is based on the premise that Islam is the opposite of the modern world and Western values. If the West calls for freedom, some react with calls for Islam to be the opposite; if the West calls for being reasonable and creative, some Muslims call for keeping to ancestral traditions even if some of those traditions are out of touch with contemporary realities. If the West demands for more rights for women, child, and animals, then some Muslims believe Islam's role must be to oppose it and that Muslims who support such rights are betraying their faith to anti-Islamic agendas.

Reactionary reasoning does not focus on proactive proposals, solution-focused and value-oriented initiatives for the Ummah or anyone else. Instead, it is contingent upon others making a statement first. So rather than suggesting and charting ways forward for greater respect towards the rights of minorities, better treatment of animals, better minimization of traumas, improved financial instruments, more creative ways of eradicating poverty, combating corruption, enhancing girl-child education, empowering the disabled and tackling environmental

challenges, many Muslims appear to wait for non-Muslims to make advances in these areas then criticize them.

Ironically, in spite of the fact that over a millennia ago Shari'ah and Islamic teachings made it explicitly clear that its objectives (*maqasid*) include the promotion of education and the search for knowledge; justice and compassion for all irrespective of religion, race or ethnicity; freedom of religious belief and worship for all; promotion and protection of life, family, wealth and human dignity and rights; protection of environment and animal rights; care and empowerment of the less privileged; promotion of freedom and opposition to oppression by anyone against any other; and all manner of promoting ethics, morals and values of enjoining right and forbidding wrong have been made an obligation on all Muslims (male and female) either in the form of individual (*fardu 'ayn*) or collective obligations (*fardu kifaya*), many religious workers do not specialise in promoting these critical areas. Their speeches and writing are often on issues that have no relevance to the advancement of social or environmental causes.

Another common cause of intellectual paralysis is loyalty to “the way things were done by our fore-fathers” rather than seeking better ways of more effectively achieving the same objectives (*maqasid*). For example, instead of creatively coming up with more merciful ways of killing animals for our consumption, we condemn new methods even when they do not contradict the letter or spirit of Shari'ah but may actually promote them. It would appear that our moral compass has lost its polarity and that, while we all desire a fairer world, we are attached to using unproductive tools to attain it.

It is essential to bear in mind the statement of Ibn Taimiyyah – quoting earlier scholars – that “Allah will protect a people who govern themselves by justice even if they are not Muslims; and Allah will not protect a people who govern themselves by injustice, even if they call themselves Muslims.”

A better understanding of the principles and objectives of Islamic Jurisprudence empowers us to be effective stewards (*khalifah*), change agents and cooperate in the doing of good and standing for what is right, even if it is against our group interests. Furthermore, it facilitates the creative spirit of Muslims who traditionally learnt from earlier civilisations and contributed to subsequent ones as part of their continuous struggle towards improving the human condition.

Alhamdulillah! 😊

Wassalamu alaykum wa rahmatullah!